Office of the Chairman
Administrative Conference of the United States

MCMLXIV

Administrative Conference of the United States

Recommendations and Reports

1979

Administrative Conference of the United States

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To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies or legislative changes.

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Administrative Conference of the United States

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For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

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RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

79-1 THROUGH 79-7

[REPORT TO THE CONGRESS OF THE UNITED STATES PURSUANT TO SECTION 202(d) OF PUBLIC LAW 93-637 (AS AMENDED BY P.L. 95-558)]

RECOMMENDATION 79-1: HYBRID RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION

(Adopted June 7-8, 1979)

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, P.L. 93-637, which became effective January 5, 1975, provides authority and procedures for the Federal Trade Commission's promulgation of "trade regulation rules." The statute requires the Commission to engage in "hybrid" rulemaking, a style which adds to the notice-and-comment requirements for "informal rulemaking" under section 553 of the Administrative Procedure Act such requirements as oral hearings (of both the legislative and evidentiary types), more extensive provision for public comment, including rebuttal, and judicial review of the rulemaking record under a "substantial evidence" standard. Such hybrid procedures represent a new approach to agency legislative rulemaking, aimed at enhancing the public's participation and testing the facts and assumptions upon which the agency bases its regulatory policy. The effectiveness and efficiency of the concept were of continuing concern to the Congress, and section 202(d) of the Magnuson-Moss Act provided:

> The Federal Trade Commission and the Administrative Conference of the United States shall each conduct a study and evaluation of the rulemaking procedures under section 18 of the Federal Trade Commission Act and each shall submit a report of its study (including any legislative recommendations) to the Congress not later than 18 months after the date of enactment of this Act. [Congress subsequently extended the deadline to not later than June 30, 1979, by P.L. 95-558.]

Since the Magnuson-Moss Act was adopted, twenty proceedings have been initiated by the Commission. By April 15, 1979, only three had been completed (one by withdrawal). The present recommendations, therefore, represent an interim analysis, based on as much information as has been available early enough to report by Congress' deadline of June 1979. The observations and conclusions in this report are based on those proceedings begun prior to April 1976. The Conference has reviewed and considered proceedings instituted after that date but has not systematically evaluated the experience in such proceedings. The Conference will continue this project with the aim of developing a supplemental report and recommendations as soon as a sufficient number of rulemaking proceedings have been completed to provide perspective on the process as a whole.

While the Commission has significant responsibilities under a number of statutes, its most important activity has always been enforcement of section 5 of the Federal Trade Commission Act, which, as originally enacted, stated "unfair methods of competition in commerce are hereby declared unlawful." This 1914 law was not construed by the courts to be a consumer protection statute. The Supreme Court, in *Federal Trade Commission v. Raladam Co.,* 283 U.S. 643 (1931), held that the Commission must in each case show some harm to competitors or the competitive system. To make clear its desire that the Commission's protection extend to consumers as well as to competition, Congress, in the Wheeler-Lea Act of 1938, added to the statute a provision that "unfair or deceptive acts or practices in commerce" are also unlawful.

Until the early 1960's the Commission did not attempt to exercise any authority to promulgate legislative rules defining unfair methods of competition or unfair or deceptive acts or practices. It used its authority under Federal Trade Commission Act section 6(g) "to make rules and regulations for the purpose of carrying out the provisions of this Act" only to issue interpretive rules and general statements of policy. Starting in 1963, however, the Commission commenced proceedings aimed at promulgating legislative rules declaring certain specific trade practices unfair or deceptive within the meaning of section 5. Between 1963 and passage of the Magnuson-Moss Act the Commission conducted 35 trade regulation rulemaking proceedings under section 6(g), using the informal notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. §553.

The Commission's authority to promulgate trade regulation rules was not free from doubt, however, and, in *National Petroleum Refiners Association v. Federal Trade Commission,* 482 F.2d 672 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974) (the *Octane* case), it was challenged in the context of a rule requiring that octane ratings be posted on gasoline pumps. The United States Court of Appeals for the District of Columbia Circuit upheld the Commission's power to make such legislative rules under section 5.

During the period the FTC's legislative rulemaking authority was in litigation, debate about the existence and desirability of legislative rulemaking authority to implement section 5 of the Federal Trade Commission Act took place in the Congress. The issue was first raised in bills introduced in late 1969 in the Ninety-First Congress. Opponents of expanded authority for the FTC contended that the Commission did not possess, and Congress should not give it, the power to make legislative rules, and that any rulemaking power Congress might nevertheless decide to create should be accompanied by restrictions to guide and control its use. The Commission and its supporters contended that the power already existed, though codification might be useful, and that section 553 of the Administrative Procedure Act provided an adequate procedural framework. After the *Octane* decision, the Congressional debate moved beyond the issue of whether the FTC ought to have legislative rulemaking authority to the question of what limitations should accompany a delegation or confirmation of such authority. The Magnuson-Moss Act represents the Congressional resolution of the different views about FTC rulemaking.

The Act extended the Commission's jurisdiction to matters "affecting commerce" as well as "in commerce," but did not otherwise change the substantive reach or definition of section 5. It added a new section 18 to the Federal Trade Commission Act which confirmed the FTC's authority to issue interpretive rules and general statements of policy, and, further, empowered the Commission to prescribe:

> rules which define with specificity acts or practices which are unfair or deceptive acts or practices in our affecting commerce (within the meaning of such section 5(a)(1)). Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

The statute also provided:

> The Commission shall have no authority under this Act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

However, Congress imposed a number of procedural limitations on the Commission's trade regulation rulemaking under section 18. The Commission was directed to "proceed in accordance with section 553" of the Administrative Procedure Act, and, in addition, to comply with several special requirements:

(1) Section 553 requires simply that an agency give notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Magnuson-Moss states that the FTC shall "publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule." The substantive effect of this change is unclear, but has been the subject of debate in several rulemaking proceedings.

(2) Section 553 provides that interested persons shall have an opportunity to submit "written data, views, or arguments" unless the agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Magnuson-

Moss requires the FTC to make all submissions "publicly available," and makes no provision for promulgating legislative rules without allowing an opportunity for public comment.

(3) While section 553 requires neither an oral hearing nor any opportunity for cross-examination or rebuttal, Magnuson-Moss requires the Commission to provide an opportunity for an informal hearing at which an interested person "is entitled . . . to present his position orally or by documentary submissions (or both)," and "if the Commission determines that there are disputed issues of material fact it is necessary to resolve" an interested person is entitled "to present such rebuttal submissions and to conduct (or have conducted . . .) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues." The Commission is also empowered to make rules and rulings for its hearings "as may tend to avoid unnecessary costs or delay." It may, for example, impose time limits, conduct cross-examination on behalf of a person, and require group representation of similar interests.

(4) Section 553 requires an agency to incorporate in any final rules "a concise general statement of their basis and purpose." Magnuson-Moss requires "a statement of basis and purpose" which includes statements as to the "the prevalence of the acts or practices treated by the rule," "the manner and context in which such acts or practices are unfair or deceptive," and "the economic effect of the rule, taking into account the effect on small business and consumers." Whether the omission from Magnuson-Moss of the words "concise, general" from the phrase "concise, general statement of their basis and purpose" has substantive importance is, again, a matter of debate.

(5) Magnuson-Moss also allows, but does not require, the FTC to provide compensation for costs of participation to any person "who has, or represents, an interest . . . which would not otherwise be adequately represented . . . " if representation of the interest "is necessary for a fair determination," and if the person "is unable effectively to participate" because he cannot afford to pay the costs. Section 553 has no comparable provision.

The Magnuson-Moss Act also specifically provides for pre-enforcement judicial review of trade regulation rules, on both the traditional Administrative Procedure Act grounds and on special grounds set forth in section 18, 15 U.S.C. §57a(e). Under the Administrative Procedure Act, a rule may be set aside if, as specified by 5 U.S.C. 706(2)(A)-(D), it is found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short or statutory right; (D) without observance of procedure required by law." In addition, under the Magnuson-Moss Act, the Commission's "action" in a trade regulation rulemaking under section 18 must be supported by "substantial evidence in the rulemaking record," which consists of the rule, its statement of basis and purpose, the transcript of the oral hearing, any written submissions, and any other information which the Commission considers relevant. However, the "contents and adequacy" of the Commission's statement of basis and purpose "shall not be subject to judicial review in any respect." The Court is also empowered to set aside the rule if it finds that denial of cross-examination or rebuttal "has precluded disclosure of disputed material facts which was necessary for a fair determination . . . of the . . . proceeding taken as a whole."

The requirements added by Magnuson-Moss seem to be based on a different model of rulemaking and the role of outside parties from the one implicit in section 553. In the words of the Conference Report, "[M]ore effective, workable and meaningful rules will be promulgated if persons affected . . . have the opportunity . . . by cross-examination and rebuttal evidence or other submissions, to challenge the factual assumptions on which the Commission is proceeding and to show in what respect such assumptions are erroneous." [1974] *U.S. Code Cong. & Ad. News* 7765.

The basic statutory objectives of allowing interested persons to challenge the basis of a proposed rule in detail, while limiting cross-examination and other hearing rights in the interest of preserving the efficiency of rulemaking, require a somewhat different strategy of implementation from the approach agencies frequently use in notice-and-comment rulemaking under section 553. Rulemaking under that section has often been treated as a loosely-structured process for fact-gathering and public statement of policy preferences—that is, as a form of decisionmaking in which the agency simply identifies a problem, outlines possible solutions in general terms, and then seeks public data, views and arguments as a means of educating itself about the subject matter. By contrast, effective implementation of the fact-testing objective of the Magnuson-Moss Act necessitates, instead of this direct "pipeline" of public views to agency decision-makers, a "funnel" approach in which agency practices and procedures are designed to achieve a progressive narrowing of the theories, factual issues, and policy considerations as the rule moves through the various procedural stages toward final decision. This "funnel" approach implies several general attributes of the rulemaking procedures: (a) more systematic, thorough investigation and consideration of rulemaking proposals than would be customary in section 553 rulemaking prior to the publication of a proposed rule; (b) more complete agency disclosure of the factual, legal and policy basis for a proposed rule than would be customary under section 553 and the general requirements of the Freedom of Information Act; (c) procedures and standards which make it possible for participants and decision-makers to narrow and focus the key matters in dispute sufficiently early in the process to permit reasonable limitations on the use of trial-type hearing procedures. At this time, it is not clear whether, or to what extent, these objectives can be achieved in the context of a broad delegation of rulemaking authority like that granted the FTC by the combination of sections 5 and 18 of the Federal Trade Commission Act. It does seem clear, however, that failure to observe these principles in agency implementation of hybrid rulemaking can impair the efficiency, acceptability, and quality of decisions.

The Magnuson-Moss Act became effective on January 4, 1975. In April 1975 the Commission promulgated Rules of Practice concerning the initial notice stage of rulemaking proceedings and in August, after notice and comment, promulgated rules for the remaining stages of a rulemaking proceeding. By April 1976, using these Rules of Practice, the Commission had commenced 16 rulemaking proceedings under the Magnuson-Moss Act. By April 1979 the number had grown to 20. Of these, three have been completed—two by publication of final rules and one by withdrawal of the proposal. The rest are still in process. Their status is presented in the following chart:

STATUS OF TRADE REGULATION RULES PROPOSED SINCE PASSAGE OF THE MAGNUSON-MOSS ACT

A. Completed Rulemakings

	Rule	Notice of Proposed Rulemaking	Status as of April 15, 1979*
1.	Ophthalmic Goods & Services (Eyeglasses)	Jan. 16, 1976 (41 F.R. 2399)	Final rule published on June 2, 1978
2.	Vocational Schools	May 15, 1975 (40 F.R. 20148)	Final rule published on Dec. 28, 1978
3.	Prescription Drugs	June 4, 1975 (40 F.R. 24031)	Proposed rule withdrawn on Nov. 24, 1978
	B. Proposed Rules Before the Commission for Final Action		
1.	Residential Thermal Insulation ("R-Value")	Nov. 18, 1977 (42 F.R. 59678)	Commission met to consider a final rule on Nov. 29, 1978; Jan. 24, 1979
2.	Funeral Practices	Aug. 29, 1975 (40 F.R. 39901)	Commission met to consider a final rule on Mar. 23, 1979
3.	Care Labeling Amendment	Jan. 26, 1976 (41 F.R. 3747)	Public comments on reports were due Sept. 18, 1978
4.	Used Cars	Jan. 6, 1976 (41 F.R. 1089)	Public comments on reports were due Feb. 13, 1979
5.	Hearing Aids	June 24, 1975 (40 F.R. 26646)	Public comments on reports were due on March 29, 1979
6.	Holder in Due Course Amendment	Nov. 18, 1975 (40 F.R. 53530)	Public comment on reports were due Jan. 24, 1979
7.	Food Advertising	May 28, 1975 (40 F.R. 23086)	Public comment on reports were due Feb. 26, 1979

STATUS OF TRADE REGULATION RULES PROPOSED SINCE PASSAGE OF THE MAGNUSON-MOSS ACT

C. Proposed Rules at the Post-Hearing Report-Writing Stage

	Rule	Notice of Proposed Rulemaking	Status as of April 15, 1979*
1.	Protein Supplements	Sept. 5, 1975 (40 F.R. 41144)	Presiding Officer report released July 31, 1978; BCP report not released
2.	Credit Practices	April 11, 1975 (40 F.R. 16347)	Presiding Officer report released Oct. 13, 1978; BCP report not released.
3.	Over-the-Counter Drugs	Nov. 11, 1975 (40 F.R. 52631)	Presiding Officer report released Jan. 4, 1979; BCP report not released
4.	Health Spas	Aug. 18, 1975 (40 F.R. 34615)	Hearings completed on Dec. 16, 1977
5.	Mobile Homes	May 29, 1975 (40 F.R. 23334)	Hearings completed on Jan. 31, 1978
6.	Over-the-Counter Antacids	April 6, 1976 (41 F.R. 14534)	Hearings completed on Feb. 6, 1979
	D. Proposed Rules in the Pre-hearing and Hearing Stage		
1.	Cellular Plastics	July 23, 1975 (40 F.R. 30842)	Revised Notice of Rulemaking and request for comment on need for TRR published Aug. 9, 1978
2.	Children's Advertising	April 27, 1978 (43 F.R. 17967)	"Legislative" hearing was concluded in March 1979; possible "disputed issues" hearing to be held later
3.	Games of Chance Amendment	Oct. 19, 1978 (43 F.R. 48654)	Scheduled hearings cancelled on Jan. 2, 1979, due to limited interest
4.	Standards and Certification	Dec. 7, 1978 (43 F.R. 57269)	Hearing scheduled to begin May 21, 1979

* The usual principal stages of a Magnuson-Moss rulemaking proceeding are: (1) Initial notice of rulemaking; (2) Final notices, designating disputed issues and setting hearing sites and dates; (3) Pre-hearing comment period (from initial notice to 45 days before hearing); (4) Hearing; (5) Post-hearing rebuttal period; (6) Presiding Officer report; (7) Bureau of Consumer Protection (BCP) staff report; (8) Public comments on the Presiding Officer and BCP reports; (9) Final recommendations by Director of BCP; (10) Oral presentations to Commission by interested persons; (11) Commission meetings to consider rule; (12) Publication of final rule and statement of basis and purpose.

The consultant's report documents that these statutory goals of more systematic development of rules by the agency and more effective participation by the public were not fully realized in many of the rulemakings initiated by the FTC. In part, this was because investigations which originated before 1975—with the objective of either selecting individual violators for cease-and-desist actions or commencing section 553 proceedings—were used as the basis for Magnuson-Moss rulemaking proceedings. As a result, information was gathered, and rulemakings were begun, without specific consideration of the meaning of "substantial evidence" in the context of FTC rulemaking or of the kinds of information necessary for an adequate analysis of the particular factors Magnuson-Moss requires to be included in the statement of basis and purpose. Moreover, at the outset the Commission's Bureau of Consumer Protection lacked both the non-lawyer personnel and the traditions necessary for large-scale policy-oriented investigations, and the resources of all kinds necessary to commence 16 rulemaking proceedings in the first year. The problems were made more difficult by the fact that no other agency had been called upon to implement hybrid rulemaking under so general a mandate as that contained in section 5, and FTC efforts to find relevant models in the hybrid procedures of other agencies were unsuccessful.

Perhaps the most important factor, however, was that the agency's implementation of hybrid rulemaking did not compel the progressive narrowing described above. The Commission did not take the steps necessary to define the relevant theories, facts and issues at an early stage or to lessen the areas of uncertainty as the proceedings continued. As a consequence, its rulemakings did not seem to result in a progressive sharpening of the Commission's own analyses of the problems. Nor did the proceedings force the participation of other interested persons to be focused, meaningful, or constructive. At the same time, of course, the statute and the FTC's Rules of Practice gave these other interested persons many opportunities to participate. This combination of broad procedural rights and lack of guidance as to the effective use of the rights resulted in extensive, repetitive presentations.

The specific problems were:

1. *The initial basis for public participation.* If interested persons are to submit informed comment and challenge the factual bases of a proposed rule, they must have access to the Commission's rationales and information supporting the proposal. However, these were often not readily available. The FTC's initial notices of rulemaking often contained conclusory or truncated discussions of the tentative legal theories, policy judgments and factual assumptions underlying the proposals.

An early and clear articulation of the bases of a proposed rule is particularly necessary in FTC hybrid rulemaking because the broad "unfair or deceptive acts or practices" standard governing the exercise of the Commission's legislative rulemaking power does not in itself give sufficient specific structure to a proceeding. The proposed rules contained a wide variety of subject-matter and remedial provisions, and involved a number of different industries. Many rules were based on novel theories of unfairness or deception rather than on traditional principles. Some rules contained multiple theories of unfairness or deception or covered numerous and varied commercial practices. As a result, considerable confusion existed throughout the proceedings regarding the nature of the Commission's rationales and the elements of the proof necessary to support or refute the Commission's proposals.

The FTC staff investigative reports recommending that the Commission initiate rulemaking sometimes contained more detailed discussions of the theories and policy choices supporting recommended rules, but these were frequently not made publicly available early enough to be used by those preparing written comments or proposals concerning disputed issues of material fact, nor did the staff reports provide clear connections between legal and policy conclusions and the factual information underlying the proceedings. In fact, many staff investigative reports contained little discussion of the evidentiary basis supporting the staff's proposal. There was often heavy reliance on postulated legal and policy considerations, rather than specific facts. Of course, many of the reports prepared in connection with pending rulemaking proceedings were written prior to passage of the Magnuson-Moss Act.

2. *Effective access to supporting materials.* Several factors tended to cause an expansion in the volume of paper in the rulemaking proceedings. In many of the investigations originally designed to develop cease-and-desist actions against particular respondents rather than industry-wide rules, compulsory process had been used to gather massive documentation concerning the practices of certain companies. In other proceedings, a wide variety of material of marginal significance had been collected as the staff educated itself about a particular industry. The Magnuson-Moss Act requirement that the Commission base trade regulation rules on a rulemaking record, together with the disclosure provisions of the Freedom of Information Act, led the FTC staff to place in the rulemaking record all of this material that might possibly be relevant, whether or not the staff had any plans to rely on it.

This expansion of volume had two important consequences. First, it took time for the staff to collect the material and transmit it to the rulemaking record. Much material was made public too late to be used by participants submitting written comments or proposing disputed issues of fact for consideration at the oral hearings. Second, the records generated were too massive and poorly organized to be used effectively. Two rules (Credit Practices and Mobile Homes) have records of over 200,000 pages. In the 14 other proceedings commenced before April 1976, the records accumulated before April 15, 1979, range from a high of 110,695 pages to a low of 8,377 pages, and average 40,551 pages. (Only three of these proceedings are yet complete, of course.) This growth in volume was not matched by a compensating investment in resources necessary to organize and index the material so as to facilitate public use. The creation of sixteen large rulemaking records in a short period of time overtaxed the FTC's record management capabilities. Problems caused by the volume of material were compounded by a lack of central control over record organization and indexing. Presiding Officers and FTC rulemaking staff attorneys experimented with diverse organizing and indexing schemes, and the resulting lack of standardization further complicated and slowed the processing of documents.

The net result was that in many situations it became virtually impossible for a participant to determine with any confidence which material was relevant to or significant for any particular point raised by a proposed ruled. This seriously undermined the concept that the basis of a rule should be tested.

3. *Availability of the pre-hearing comments.* In theory, the prehearing written comments submitted by interested persons could provide a framework for subsequent stages of a proceeding by sharpening the issues, suggesting alternatives to agency assumptions, and delineating the central matters in dispute. In fact, these comments were rarely referred to at the hearings.

This was due partly to deficiencies in the record management system. The chaotic situation described above often led to substantial delays in placing written comments, as well as other materials, on the record. When the comments were incorporated into the record, shortcomings in the indexing or availability of records made it difficult or impossible to use them in a timely, efficient manner.

4. *"Discovery."* In part because of the difficulties of identifying the key legal theories or policy assumptions and of locating crucial supporting material in the rulemaking records, and in part because counsel for some interested persons tended to treat the proceedings as the equivalent of multiparty adjudication, interested persons frequently filed a variety of discovery motions and Freedom of Information Act requests in an effort to obtain statements of the theories and information upon which the Commission intended to rely. The Commission has never clarified whether it regards discovery motions as a legitimate device in rulemaking proceedings, nor established any systematic procedure whereby participants can obtain an elaboration or clarification of the staff's legal and policy theories or compel the production of underlying materials. Requests for "bills of particulars," written interrogatories directed at the FTC staff and attempts to discover the staff's case at prehearing conferences have been uniformly rejected. Therefore, the participant's basic rights of access to FTC material have been defined by the Freedom of Information Act. Moreover, the agency complied with FOIA by placing large, undifferentiated masses of material on the rulemaking record, a practice that does little to define the issues in a proceeding or to establish the relative importance of different pieces of information to the rulemaking proposal. At the same time, processing discovery requests and complying with FOIA has involved a significant drain on staff resources.

Similarly, the Commission has not established any systematic procedure whereby the staff can force an elaboration or clarification of other participants legal and policy theories, or, within the context of the rulemaking proceeding, compel the production of underlying materials. It has, however, confirmed the authority of the staff of the Bureau of Consumer Protection to issue subpoenas independently of the Presiding Officer.

An additional discovery issue concerns the rights of one non-FTC participant to persuade the Presiding Officer to subpoena records of another. As of April 15, 1979, such a subpoena has been issued on only one occasion, but the potential of such third party subpoenas to create delay and disincentives to participation could be significant.

5. *Designation of disputed issues.* As the rulemaking scheme established by the Magnuson-Moss Act was implemented by the Commission's rules of practice, "disputed issues of material fact which are necessary to resolve" were identified before any hearing, and indeed even before the close of the initial comment period. As a means of limiting cross-examination at the oral hearings, this device proved unworkable. It required identification of highly specific issues at a time when there had been minimal definition of even the major issues in the proceeding. It required identification of factual disputes even before interested persons had finished submitting their initial data, views and arguments in prehearing comments. Finally, it required Presiding Officers to make complicated, important judgments before they had had time to master the subject matter, and in a context in which the interested parties had an incentive to advocate broad, vague designations that would avoid precluding cross-examination on any issue.

The result was that the designation of issues on which cross examination might be allowed did little to focus the proceeding. If the statutory phrase "disputed issue of material fact . . . necessary to resolve" is to serve as a limitation on cross-examination, or as a means of focusing on crucial fact issues, then identification of fact issues must take place after the major issues in the proceeding have been made as clear as possible, and with reference to specific evidence previously entered into the rulemaking record.

6. *Conduct of cross-examination.* Largely because the designation process failed to produce sets of precisely defined issues, the effort to use designation as a device for limiting cross-examination was abandoned in favor of a "freedom-for-time" policy. Group representatives and FTC staff could question witnesses on any points they wished, so long as they stayed within established time limits.

This "freedom-for-time" policy permits cross-examination to concentrate on policy or opinion rather than factual issues, and, because much of the testimony offered in the hearings consisted of repetitious opinion unsupported by specific factual data, such cross-examination has seldom produced useful factual information. It generally has involved a credibility attack on the witness or his testimony.

7. *Utility of oral hearings.* Oral hearings generally were not used to refine or respond to points made in the prehearing written record; rather, they tended to become an independent stage of the proceedings. This can be attributed to the fact that the prehearing phase did not produce an adequate identification of points at issue, and that Magnuson-Moss leaves debatable the Presiding Officer's authority to exclude the testimony of repetitive witnesses. In addition, the hybrid, partly adversary character of the proceedings, in which group representatives were given some of the rights of parties in trial-type proceedings while presiding officers were delegated broad authority to limit or control the group representatives' participation, produced some uncertainties and difficulties for the presiding officers in controlling the proceedings, and in some instances contributed to an antagonistic atmosphere at the hearings.

The Administrative Conference study has necessarily focused on the rulemaking proceedings begun in 1975 and 1976. None was commenced in 1977 until the Thermal Insulation Rule was noticed on November 18, 1977. The Conference does not at this time have extensive information on the Thermal Insulation Rule, the Children's Advertising Rule (noticed April 27, 1978), the Games of Chance Amendment (noticed October 19, 1978), or the Standards and Certification Rule (noticed December 7, 1978). In addition, the consultant's reports now available to the Conference cover the rulemaking proceedings only through the stages of investigation, initial and final notices of rulemaking, prehearing comment and oral hearing. Thus the post-hearing procedures have not been considered, and no recommendations concerning these procedures, or concerning the statutory scheme as a whole, can be advanced at this time.

One point deserves special emphasis. The Commission's approach to rulemaking has not been static. The Commission itself has recognized many of the problems discussed above, and has been experimenting with a series of measures designed to improve its rulemaking. For example, new procedural approaches are being tried in all four of the most recent rules. Commission awareness of the need for greater input from the Bureau of Economics has resulted in the creation of a new division of that Bureau to work exclusively upon consumer protection matters. Directives have been issued designed to make the initial staff reports more thorough and useful. Steps have been taken to increase the accessibility of rulemaking records by improving organization and indexing, and by making documents available on microfilm. Internal efforts to develop better rulemaking processes have resulted in the FTC's 1978 Operating Manual, which is cited at several places in the consultant's report as reflecting conclusions similar to those of the Conference study.

Thus, the recommendations set forth below are not intended to imply that the Commission has not recognized the problems or taken steps to alleviate them. They represent, rather, the Conference's current views on practices which will promote effective and efficient rulemaking under Magnuson-Moss, including some already utilized or endorsed by the FTC.

The Conference does not recommend any revisions in the statute at the present time, though such recommendations may be forthcoming after completion of the supplemental report.

RECOMMENDATIONS

1. The Commission should include in the initial notice of proposed rulemaking a description of the theories and materials which it then considers relevant to the rulemaking, together with appropriate references to the rulemaking record, including materials both supporting and opposing any proposed rule. The notice should indicate with reasonable specificity both the issues upon which the Commission seeks comment and information, and the kinds of evidence or information that are likely to be valuable to the Commission's resolution of the issues.

2. At the time the notice of proposed rulemaking is published, the Commission, consistent with its present policy, should place in the rulemaking record, and index, the staff investigative report recommending rulemaking (which should contain the staff's analysis of the issues, a summary of the information considered significant by the staff, and the methods of analysis used by the staff) and all relevant information in the possession of the staff. Information exempt under the Freedom of Information Act may be withheld. Similarly, all relevant material developed by the staff after the notice is published should be promptly placed in the rulemaking record, and indexed.

3. To the extent feasible, and as early as practicable in the proceeding, the Commission should provide guidance to participants concerning suggested methods for the marshalling and presentation of information.

4. The Commission, to the extent feasible, should promote (but not require) the use of standard methods for the marshalling and presentation of information with respect to issues commonly recurring in trade regulation rulemaking proceedings.

5. In conducting investigations which may lead to trade regulation rulemaking, the Commission should experiment with techniques for eliciting increased information and views from the public, including the use of advance notices of proposed rulemaking with opportunity for public comment and meetings or conferences open to the public on adequate notice. The Commission should assure that its staff solicits the views of affected interest groups during the course of the investigation, including groups that might not otherwise participate.

6. Many issues that arise in the course of formulating rules pursuant to section 18 of the Federal Trade Commission Act require, or can benefit from, the contributions of disciplines other than law. The Commission should continue its efforts to assure appropriate use, at all stages, of experts

whose disciplines are relevant to consideration of the proposed rule, including economists, statistical analysts and consumer research specialists.

7. To avoid burdening the rulemaking record, the Commission, consistent with its present policy, should require that the staff maintain, separately from that record, a public file of related documents, collected and generated by it, that the staff, pursuant to procedures established by the Commission, has determined not to be relevant.

8. Proper handling of rulemaking records can greatly assist public participation in proceedings, reduce delay, and enhance the quality of decisions. The Commission should continue and intensify its efforts to improve public and staff access to the rulemaking record through upgrading of record management practices, storage and retrieval technologies, copying and microfilming capability, and record indexing and organization. The Commission should ensure that all materials in the rulemaking record are indexed as they are received, and that adequate facilities are provided for members of the public to inspect, copy, and work with the record.

9. The use of subpoenas should be restricted to the investigation conducted by the Commission staff to develop information relevant to the rulemaking, including information both supporting and opposing the rule. Once a hearing has been noticed, the subpoena power should be used sparingly, and, once a hearing has been commenced, should be used only with the approval of the Presiding Officer upon a showing of need.

10. In lieu of a discovery practice, the Commission should provide by rule that at a hearing or within a reasonable time thereafter the Presiding Officer, on his own motion or on that of the Commission staff or any other participant, may request the staff or any other participant at that hearing to clarify, elaborate or support any oral or written presentation then or previously made by such participant. The rule should also provide that failure to comply with such a request may result in the drawing of adverse inferences with respect to the presentation, or a reduction in the weight to be given to the presentation.

11. If a person appealing from the Commission's initial denial of a Freedom of Information Act request asserts that the information sought is desired for use in a pending rulemaking proceeding, the agency official handling the appeal should not affirm the denial on the basis of an exemption in that Act without first obtaining the views of the Presiding Officer in the proceeding as to the utility of that information, except where withholding the information is required by law. The Commission should adopt such amendments to its Freedom of Information Act procedures as may be necessary to assure this consultation.

12. As a general practice the Commission, after the close of the first period of submission of written comments, should conduct a legislative-type hearing, following which it should determine whether there appear to be "disputed issues of material fact it is necessary to resolve." If it so

determines, such issues should be designated with specificity, and a further hearing in accordance with section 18(c) of the Federal Trade Commission Act, should be held for the purpose of resolving them.

13. An oral hearing can serve any or all of at least four somewhat separate functions: (1) fact gathering; (2) fact testing; (3) assessment of the views of different segments of the public; and (4) clarification of positions and exchange of views on policies, values or desirable lines of inquiry. The fact testing function is performed in the section 18(c) hearing referred to in Paragraph 12, above. The legislative hearings should be designed according to which of the other three functions is believed likely to predominate. For example, the clarification of positions and exchange of views on policies, values or desirable lines of inquiry may best be furthered by such informal devices as roundtable or panel discussions.

14. The statutory phrase ''disputed issues of material fact it is necessary to resolve'' should be understood to mean only those issues (1) which are capable of being resolved as matters of fact, and (2) whose resolution is essential to the evaluation or formulation of a rule.

15. Cross-examination may not be necessary on a designated disputed issue of material fact. However, if the Commission determines to limit or deny cross-examination on a designated issue, it should state the basis for its decision.

RECOMMENDATION 79-2: DISPUTES RESPECTING FEDERAL-STATE AGREEMENTS FOR ADMINISTRATION OF THE SUPPLEMENTAL SECURITY INCOME PROGRAM

(Adopted June 7-8, 1979)

Public assistance in the United States was originally exclusively a function of local governments. States first became involved by their establishment of institutions to accommodate particular categories of persons, e.g., the blind, the insane, the deaf, the aged. Early in this century many States established programs of cash benefit payments for needy mothers and aged persons. A federal role in public assistance did not develop until the Depression: first with a temporary program of grants-in-aid enacted in 1933; and then with a permanent program established in 1935 by the Social Security Act, under which the federal government was authorized to reimburse specified portions of the State and local public assistance payments for three categories of needy persons, the aged, the blind, and dependent children. A fourth category, the disabled, was added in 1951, and in 1965 Medicaid, a similar grant-in-aid program for the medically indigent, was established.

From 1936 to 1974 a series of federal agencies exercised the federal role which, pursuant to the pertinent titles of the Social Security Act, was to enunciate the eligibility conditions to be met by State public assistance programs (including substantive, procedural and administrative features) and to make payments by way of reimbursement to the States of statutorily stipulated fractions of public assistance expenditures under their eligible programs. The responsible federal agency, since 1953 the Department of Health, Education and Welfare (HEW), exercised considerable influence over State public assistance programs through establishment of State program conditions and review of State program operations for purposes of determining the fact and amount of State reimbursement entitlement.

In 1972, Congress replaced federal grant-in-aid support for State programs of public assistance to the needy elderly, blind, and disabled with a federally administered cash benefit program for the same groups. This program is known as the Supplemental Security Income Program or SSI. The federal-State grant-in-aid program for needy families with dependent children (AFDC) was left untouched by the transformation of SSI. (Proposals for and discussion of "welfare reform" usually refer to making a comparable transformation of AFDC; in 1972 such a proposal, the Family Assistance Program, was rejected by the Congress as it enacted SSI.)

State public assistance programs for the aged, blind and disabled have not been entirely displaced by SSI, because the level of federal SSI benefits (below what many States were paying under their predecessor programs) and the simplification of its benefit formula (as compared with prior State programs) leave substantial room or need for supplementary State assistance to these groups. As initially enacted, the 1972 SSI legislation encouraged States voluntarily to supplement the Federal SSI amounts, but subsequent amendments require them to do so in amounts based on their prior public assistance expenditures. (The requirements are imposed as a condition for continued receipt of federal grant-in-aid support for state Medicaid programs.)

Federal administration of the SSI program is lodged in the Social Security Administration (SSA), a major operating element of HEW. SSA and a State may enter into an agreement for SSA to administer the State's supplementary benefits, and in such event SSA includes both the basic federal SSI benefit and the State supplement in a single check to the recipient. Strong fiscal inducements structured with the SSI program have led most States with significant supplements to enter such agreements.

To implement its role as administrator of State supplementary benefits, SSA developed a set of proposed model agreements which it distributed for consideration by the States through the American Public Welfare Association (APWA), which had contracted with SSA to serve as liaison with all the States. Through a process of negotiation over those model agreements with a committee established through APWA, SSA and that committee agreed upon the general terms and conditions which formed the basis for SSA's original agreements with the 31 States electing federal administration of State benefits. (Some of those States have since withdrawn from federal administration, and others have joined; currently 27 States have their supplementary benefits administered by SSA.) Similar negotiations over revised model agreements took place in 1974 and 1976. Overall this process was quite successful, yielding general terms and conditions (still called "model agreements") which reflected and responded to State interests and problems, as well as the federal interest. While notice-and-comment rulemaking procedures of §553 of the Administrative Procedure Act were utilized by SSA to establish by regulation some of the basic parameters of these federal-State agreements, they were not followed in promulgating the general terms and conditions of those agreements, either initially or in subsequent revisions. Those provisions, as contained in the model agreements, deal with many important issues not covered by the regulations, including some of significant potential interest to supplementary benefit recipients. Combining notice and public comment procedures with the process of discussion with the States, through a representative committee, would assure individual States, beneficiaries and other interested persons and groups a full opportunity to present views upon proposed agreement terms and the agreement-formation process.

Shortly after the first agreements were executed and the SSI program was underway, serious disputes about the parties' respective responsibilities and liabilities arose. The novelty of the relationship coupled with the start-up difficulties of the program created a large initial volume of controversy and uncertainty over how these disputes should be handled. The statute makes no explicit provision for administrative or judicial resolution of such disputes. In the agreements, the "disputes" paragraphs and related provisions leave significant uncertainties and deficiencies, which in turn generate substantial shortcomings in the dispute-resolution process.

The present "disputes" provision affords an opportunity for a hearing before the HEW Departmental Grant Appeals Board, but does not delegate to that Board the HEW Secretary's power of final decision. Under the dispute-settlement procedures of federal contracts, administrative finality ordinarily attaches only to determinations of an independent and reasonably expert decision-making body, such as a board of contract appeals, to which the Departmental Grant Appeals Board is analogous in the present circumstances.

The breadth of coverage of the disputes provision is subject to substantial and injurious uncertainty. While there are indications that the present provision may have been intended to cover most or all disputes regarding performance of the parties, language has been used which in other federal contracts has consistently been more narrowly interpreted.

Additionally, desirable utilization of the disputes procedure has been impaired by the awkward operation of the liability provisions of the agreement, even where disputes under such provisions would clearly be covered by the established procedures. Numerous disputes involving large sums have been stalled, without effective access to the disputes procedure, because of insufficiencies of the basic liability provisions and the measurement systems to which they were keyed. States have extensively used self-help remedies, which might have been avoided if the provisions of the agreement had furnished a surer basis for prompt resolution of these disputes.

RECOMMENDATION

1. The process of negotiation and agreement between the Secretary of HEW on the one hand, and individual States desiring federal administration of SSI suplementary benefits on the other, is conducted in substantial part on the basis of the general terms and conditions established by HEW. These general terms and conditions (sometimes called "model agreements")

are in turn related to published regulations of HEW. Both the regulations and the general terms and conditions should be developed by a procedure that embraces both (a) discussions with a representative committee of State officials, of the type that led to agreement on successive versions of the general terms and conditions in 1973, 1974, and 1976, and (b) the notice and public comment procedures of 5 U.S.C. §553. The notice of proposed rulemaking (or, in appropriate cases, an advance notice of proposed rulemaking) should precede the discussions with the committee of state representatives. This does not necessarily imply an added cycle of notice and public comment nor any diminution of HEW's flexibility in negotiation.

Since the current general terms and conditions have never been the subject of notice and public comment, and include several areas noted in paragraphs 2 and 3 below in which procedural improvements can be achieved, HEW should initiate a full review of them, utilizing the above procedures.

2. Consideration should be given through such procedures to a new agreement provision for measuring the respective liabilities of the federal government and of the states. In formulating such new provision, specific consideration should be given to (a) inclusion of liability standards and measurement systems that are generally acceptable to the States, (b) explicit establishment of the right of a State to seek any adjustment of liability that its own data (derived through the generally accepted systems) may indicate, with recourse to the contractual disputes procedure in the event SSA declines adjustment on the basis of such State data, and (c) possible procedures for separate treatment of liability for errors resulting from consistent SSA practices or policies that violate statute, regulation or agreement, as distinct from liability for random errors in general.

3. On the assumption that the agreements will continue to contain a provision granting dispute resolution authority to an official or officials in HEW, the provision should be amended (a) to encompass, without doubt or ambiguity, all disputes between the parties concerning performance of their respective obligations arising out of the agreement—including federal claims of State noncompliance, (b) to assure prompt resolution of all disputes submitted pursuant to its terms, and (c) to provide that the last stage of the administrative dispute process is to be before the HEW Departmental Grant Appeals Board, which shall render an independent decision, based on a hearing and the record.

RECOMMENDATION 79-3: AGENCY ASSESSMENT AND MITIGATION OF CIVIL MONEY PENALTIES

(Adopted June 7-8, 1979)

The civil money penalty has become one of the most widely used techniques in the enforcement programs of federal administrative agencies. Most regulatory offenses punishable by civil penalties involve adverse social consequences of private business activity. The motivational impact of these penalties depends in large part on the certainty of imposition and uniformity of amount, although some cases may require individualized tailoring to the circumstance of the offender so as to remove the economic benefit of the illegal conduct. Other civil penalties may also serve a secondary function of compensating society for the harm caused by unlawful conduct.

Recommendation 72-6 urged that the advantages of civil money penalties would be best achieved through an "administrative imposition system" in which the agency would be empowered to adjudicate the violation and impose the penalty after a trial-type hearing, subject to "substantial evidence" judicial review. Such a system, it was stated, would avoid the delays, high costs, and jurisdictional fictions inherent in the traditional and most common system of imposing civil money penalties by a court in a civil action initiated on behalf of the agency by the Department of Justice.

Since adoption of that Recommendation in 1972, the use of civil money penalties in general and of administratively imposed civil money penalties in particular has increased significantly, and the constitutionality and desirability of administratively imposed penalties has been widely recognized.

Experience has shown that agencies play a crucial role and exercise broad discretion in the administration of civil penalty programs, whether or not the statute in question authorizes an administrative imposition system. Agencies possessing such authority have found it efficient to try to resolve cases before the formal hearing stage, through settlement and negotiation. Those agencies not possessing administrative imposition authority operate under a wide variety of statutes: some make no express reference to an agency role in the penalty process, while others confer on the agency only a power to "assess" or to "mitigate" penalties, thereby expressly or implicitly reserving to the respondent the right to seek a subsequent de novo fact-finding hearing by the court in a collection proceeding. Agencies typically exercise their statutory authority to "mitigate" in resolving contested penalty assessments prior to the initiation of formal enforcement action. In these recommendations the term "mitigation" refers to any informal process of resolving a contested initial penalty assessment.

Whatever the statutory framework, the enforcing agency typically makes the initial assessment, and provides a process of mitigation of the penalty. Thus, both where there exists administrative imposition authority and where such authority does not exist, agencies and respondents customarily utilize these initial assessment and mitigation processes to resolve the great majority of civil money penalty cases without reaching the stage of formal administrative adjudication or a court collection proceeding.

These informal processes for the initiation and termination of civil penalty proceedings represent an area of previously unstudied and largely discretionary agency action. Appropriate standards and structures for the exercise of such discretion are needed to improve the consistency, efficiency and openness of agency assessment and mitigation processes.

The recommendations that follow focus on (A) the need for agencies to develop standards for determining penalty amounts, (B) agency procedures for initially assessing penalties, (C) agency mitigation procedures, and (D) the use by agencies of evidentiary hearings to impose civil penalties where such a procedure, though not required by statute, might result in a limited scope of judicial review.

RECOMMENDATION

A. Standards for Determination of Penalty Amount

1. Agencies enforcing regulatory statutes, violation of which is punishable by a civil money penalty, should establish standards for determining appropriate penalty amounts for individual cases. In establishing standards, agencies should specify the factors to be considered in determining the appropriate penalty amount in a particular case. To the extent practicable, agencies should specify the relative weights to be attached to individual factors in the penalty calculation, and incorporate such factors into formulas for determining penalty amounts or into fixed schedules of prima facie penalty amounts for the most common types or categories of violations. A penalty intended to deter or influence economic behavior should, at a minimum, be designed to remove the economic benefit of the illegal activity, taking into account the documented benefit and the likelihood of escaping detection. Penalty standards should, in addition, specify whether and to what extent the agency will consider other factors such as compensation for harm caused by the violation or the impact of the penalty on the violator's financial condition. In order to reduce the cost of the penalty calculation process and increase the predictability of the sanction, simplifying assumptions about the benefit

realized from or the harm caused by illegal activity should be utilized.

2. Agencies should periodically evaluate the continuing effectiveness of their penalty standards. Such evaluations should be based upon the results of compliance surveys and internal audits of agency assessment and mitigation decisions as well as data on the nature and frequency of violations routinely generated by the agency's enforcement program.

3. Agencies should make such standards known to the public to the greatest extent feasible through rulemaking or publication of policy statements. Such an approach is especially desirable where adjudications that produce written decisions are rare.

4. Agencies should collect and index those written decisions made in response to mitigation requests or after agency assessment hearings, and make such decisions available to the public except to the extent that their disclosure is prohibited by law. Whenever a respondent cites a previous written decision as a precedent for the agency to follow in the respondent's case, the agency should either do so, distinguish the two cases, or explain its reasons for not following the prior decision.

B. Initial Assessment of Penalties

1. Agencies should give adequate written notice to the respondent of the factual and legal basis for, and amount of, the penalty assessment.

2. Agencies should not mechanically assess variable civil money penalties at the statutory maximum if reliable evidence in their possession indicates the presence of mitigating factors. Nor, if they possess such evidence, should agencies assess at the statutory level fixed penalties which are subject to an express administrative "mitigation" authority.

3. The greater the degree to which an agency decentralizes its penalty assessment authority, the more it should structure the exercise of that authority by the use of highly specific standards. Agencies should not ordinarily delegate discretionary authority to assess civil money penalties to investigative personnel unless the delay inherent in review by an independent assessment official would materially impair the effectiveness of the enforcement process.

C. Mitigation of Penalties

Respondents in civil money penalty cases have a right to a trial-type hearing at either the administrative or judicial level. It is nevertheless desirable that agencies establish fair and economical procedures whereby respondents may informally contest the initial assessment of civil penalties without the necessity of going forward to trial-type hearings. These procedures should be governed by the following principles:

1. Agencies should provide the respondent with a right to reply in writing to a penalty claim.

2. Agency staff should not refuse a reasonable request to discuss a penalty claim orally. But an informal conference need not be built into the process except in those categories of cases where the use of written communications is likely to prove inadequate because of such factors as the unsophistication of violators or the prevalence of factual disputes.

3. Agencies should consider providing an opportunity for administrative review of a decision denying a request for mitigation.

4. Agency decisions on mitigation requests should be in writing and should be accompanied by a brief indication of the grounds for the decision.

5. In regulatory programs typically involving the imposition of small penalties, agencies may appropriately rely most heavily on readily ascertainable standards of liability, fixed schedules of prima facie penalty amounts for the most common types of categories of violations, and highly objective inspection procedures. Opportunity for mitigation should be narrowly confined and mitigation requests entertained only if in written form.

6. In regulatory programs typically involving the imposition of large penalties, agencies may appropriately provide an opportunity to a respondent to present a request for mitigation, orally or in writing, request an oral conference thereon, receive a written decision, and submit a written petition for review of such decision or for compromise of such claim at a higher agency level.

D. Evidentiary Hearings

As expressed in Recommendation 72-6, it is desirable that agencies be given express authority to employ the procedures of adjudication on the record pursuant to the APA, 5 U.S.C. §§554-557, for the imposition of civil money penalties. Where its statute does not provide for such procedure but confers upon the agency authority to "assess" or to "mitigate" a penalty, particularly if the agency is required to conduct a "hearing," the agency should consider establishing such procedures by regulation, especially where by doing so a de novo proceeding upon judicial review could be avoided. Where such a hearing procedure has in fact been observed by the agency, and the statute does not provide for de novo judicial proceedings, the court should ordinarily utilize a limited scope of review of such agency action imposing civil money penalties.

RECOMMENDATION 79-4: PUBLIC DISCLOSURE CONCERNING THE USE OF COST-BENEFIT AND SIMILAR ANALYSES IN REGULATION

(Adopted June 7-8, 1979)

Federal agencies must frequently weigh competing health, safety, resource management, environmental, economic, and other societal interests when seeking to achieve a prescribed statutory objective. Wise decision-making presupposes that the potential benefits and costs of the actions under consideration will be identified, will be quantified if feasible, and will be appraised in relation to each other. To give structure to the exercise of this responsibility, agencies sometimes use "cost-benefit" or similar analytic approaches to organize available information to determine the consequences of possible courses of action in terms of their costs, risks and benefits. Such techniques seek to display the projected net effects of alternative courses of action and, when properly used, can assist the decision-maker in deciding which of the alternatives is most likely to produce a desired result.

The following recommendation seeks to promote openness in the decision-making process, to ensure that agencies' analytic methods are sound and that their assumptions are known, so as to enhance public confidence in the soundness of conclusions finally reached. The recommendation is not intended to promote or to discourage the use of any single kind of analysis as a framework for agency decision-making since this choice is normally a matter of agency discretion. The choice of analytic technique may depend on several factors, including the technical complexity of the problem, the magnitude of the impacts, the time frame for agency action, and the extent to which quantification is possible for the specific costs and benefits to be considered. Any analysis, of course, should be viewed as an aid to rational decision-making, and not as an end in itself. The intent of the recommendation will be served by giving the public adequate advance notice of the agency's proposed methodologies, either generically or by means of special notice in a particular proceeding.

Recommendation

1. Agencies, as general policy though not necessarily by binding rule, should adopt the practice of addressing, in their public notices of particular proceedings in which cost-benefit or similar analyses are to be used, the following points:

a. Any statutory or other legal requirements pertaining to or affecting the agency's conduct of cost-benefit or similar analyses in the proceeding.

b. The particular analytic technique to be followed by the agency (e.g., cost-benefit analysis, cost-effectiveness analysis, qualitative or non-numerative balancing), with a description of the method, including an identification of any analytic models preliminarily determined to be used.

c. Any factual assumptions or preliminary findings of the agency to be utilized in the analyses.

d. The agency's techniques for assessing and revealing uncertainties in its quantitative estimates, and making explicit the range of error associated with particular quantitative estimates.

e. The agency's methods for evaluating intangible costs and benefits, for discounting future costs and benefits, and for taking account of distributional effects arising under the selected methodology, to the extent such issues are involved in the analyses.

f. The stages of the proceeding at which the cost-benefit or similar analyses will be conducted and the results considered.

g. The extent and nature of public participation in the design, conduct, and evaluation of the cost-benefit or similar analyses.

h. The extent and manner in which the public is to be accorded access to assumptions and information used in the analyses.

A statement of the weight given the cost-benefit or similar analyses, and a description of any revisions of assumptions or preliminary findings, should be included in the final agency determination and made available to the public.

2. Where a pattern of recurring decisional problems exists for which a particular analytic technique is appropriate, the agency should consider adopting a generic regulation or policy statement describing the use of that technique with respect to those problems. Agencies that have varied statutory functions may suitably formulate separate regulations or policy statements for different areas of statutory responsibility. Generic regulations or policy statements so adopted may permit the use of different techniques on an ad hoc basis where the agency determines that to be necessary. Any such regulations or policy statements should address the points listed in paragraph 1.

RECOMMENDATION 79-5: HYBRID RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION—ADMINISTRATION OF THE PROGRAM TO REIMBURSE PARTICIPANTS' EXPENSES

(Adopted December 14, 1979)

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, P.L. 93-637, which established procedures for the Federal Trade Commission's promulgation of trade regulation rules, also authorizes the Commission to "provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating" in those proceedings. The statute (15 U.S.C. sec. 57a(h)(1)) provides that the Commission may reimburse the expenses of

> any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole and (B) who is unable effectively to participate in such proceedings because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceedings.

The present Recommendation is addressed to relatively technical questions that have arisen in connection with the Commission's administration of this expense reimbursement program, and not to the issue of whether a reimbursement program is desirable. Since the Commission has completed only three Magnuson-Moss rulemaking proceedings, assessments of the value or the overall impact of this program cannot yet be made. The Conference does anticipate that these larger questions will be addressed in its final report on Magnuson-Moss rulemakings at the Federal Trade Commission.

The Commission, lacking specific statutory guidance and the benefit of other agencies' experience, progressed slowly, through trial and error over a two-year period, in developing its practice for administering its expense reimbursement program. The efforts of the Commission in this regard are more fully described in the report on which this recommendation is based, and merit consideration by other agencies establishing such programs. The Commission's present system of administration appears to implement faithfully and efficiently the reimbursement program established by the statute, and the conclusions embodied in the recommendations set forth below are drawn from an examination of its experience.

RECOMMENDATION

1. The Conference recommends that the Federal Trade Commission, in its implementation of the expense reimbursement program established by the Magnuson-Moss Act, continue to observe the following principles, which in large part reflect the Commission's current practice.

(a) Interested members of the public should be given an opportunity to comment on proposed regulations and guidelines for administering any expense reimbursement programs.

(b) The availability of funding should be set forth in the principal agency documents announcing the initiation of a proceeding, such as published notices of proposed rulemaking and press releases. The announcements should advise where further information on the funding program can be obtained. In addition, affirmative steps, such as direct notification of industry organizations, consumer groups, and other voluntary associations likely to be interested, should be taken to inform potentially interested members of the public of the availability of reimbursement funds. Lay-language booklets and brochures explaining the funding program and the procedures for obtaining reimbursement should be prepared and distributed.

(c) Filing dates for reimbursement applications should be established and announced well in advance. Since, however, participatory needs or desires may change by reason of the evolving nature of rulemaking proceedings, applications filed after these dates should be considered to the extent feasible.

(d) Applications for reimbursement should be acted on expeditiously in order to allow applicants adequate time to prepare for participation in the proceeding.

(e) Advance payments to recipients should be available where necessary to allow adequate preparation for participation.

(f) Responsibility for granting or denying applications should not be given to personnel in the office within the agency that has direct responsibility for developing the staff position in the proceeding for which reimbursement is sought. However, these persons and others familiar with the proceeding (including presiding officers) should give their views to the persons with responsibility for reimbursement decisions on such matters as the relevance of the applicant's proposal, the applicant's interest in the proceedings, and the relationship between the applicant's proposal and the views and information expected to be otherwise presented in the proceeding. Wherever feasible, those with responsibility for reimbursement decisions should also be given access to experts, who are independent from any office within the agency that has direct responsibility for developing the staff position in the proceeding, on matters such as survey design and other research activities proposed by an applicant.

(g) When the character of an applicant as a representative organization is important to the decision to authorize reimbursement, the persons with responsibility for reimbursement decisions should consider the nature of the relationship—e.g., whether the applicant receives contributions from members or constituents, whether the applicant has a record of advocating similar positions with apparent member or constituent approval and whether the applicant advises its members or constituents of the position it is taking or has taken in the proceeding. The agency should also require the recipient to advise its members or constituents of its position.

(h) It should be recognized that a legislative standard which limits reimbursement to applicants who cannot afford to pay the costs of participation involves consideration of the applicant's priorities and other spending decisions, its prospects for other funding, and similar questions.

(i) Applicants should be advised in writing of the reasons for grant or denial of their applications. All advisory letters should be indexed and made publicly available.

(j) Programs for auditing the performance of reimbursed entities, including both an examination of their use of funds received and an assessment of the quality of their work product, should be established. Sufficient resources should be allocated to ensure that audits are completed on a timely basis, so that supplemental or subsequent funding decisions can be informed by the results of the audits.

(k) An expense reimbursement program can serve several broad purposes—such as broadening the sources of the information presented (or developed by cross-examination) in a proceeding, improving the quality of the information in the record of a proceeding, and providing for participatory democracy by encouraging the expression of public views. The Magnuson-Moss Act does not specify which of those objectives are to predominate in a reimbursement decision. The degree of emphasis placed on one or another of these purposes can lead to different decisional criteria. The agency should specify those purposes that it recognizes and the factors that it will consider in determining whether a reimbursement application might further those purposes.

2. The Conference recommends the principles set forth in Paragraph 1 for the consideration of agencies establishing expense reimbursement programs for rulemaking proceedings, and, as applicable, for the consideration of the Congress, if it were to formulate a statutory program for reimbursing the expense of participants in rulemaking proceedings.

3. A congressionally-established expense reimbursement program, if

one were to be created, should expressly provide for the funds and staff positions necessary to implement the program, including provisions for administration, outreach activities, and financial and quality-control audits.

4. If the Congress were to establish an expense reimbursement program, it should specifically authorize the agency to make advance payments to funded participants if the agency does not clearly have that authority.

RECOMMENDATION 79-6: ELIMINATION OF THE PRESUMPTION OF VALIDITY OF AGENCY RULES AND REGULATIONS IN JUDICIAL REVIEW, AS EXEMPLIFIED BY THE BUMPERS AMENDMENT

(Adopted December 14, 1979)

Symptomatic of concern that reviewing courts do not probe as deeply as they should into the legality of agency action and that, as a consequence, administrative rules may be too broad in their reach is the so-called Bumpers Amendment to S. 1477, the Federal Courts Improvement Act of 1979.

The Bumpers Amendment in its principal operative part amends 5 U.S.C. Sec. 706 to insert after the first sentence of the section a sentence that reads, "There shall be no presumption that any rule or regulation of any agency is valid," and a court in which the validity of a rule or regulation is drawn in question "shall not uphold the validity of such challenged rule or regulation unless such validity is established by a preponderance of the evidence shown."

For reasons stated below the Conference opposes the enactment of the Bumpers Amendment. Concern about the broad substantive reach of the administrative rules of a host of agencies cannot be effectively addressed by legislatively imposing across-the-board procedural rules for judicial review.

1. The wording of the amendment raises numerous interpretative questions that are compounded rather than answered by its legislative history. Previous versions of the amendment proposed to insert the phrase "de novo" into the first sentence of Section 706, as follows: "To the extent necessary to decision and when presented, the reviewing court shall [*de novo*] decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Although that change was not a part of the amendment as approved by the Senate, statements of its sponsors nonetheless indicate that they intend by the amendment to eliminate the doctrine under which courts reviewing agency action pay deference to the agency's views concerning interpretation of the statute it administers. Because of the discrepancy

between this history and the terms of the amendment as adopted, which contains no words that explicitly indicate the intent to eliminate the deference doctrine, the amendment in its present form would generate troubling problems of construction.

2. The text of the amendment does clearly reflect the sponsors' desire to eliminate any presumption of validity of an agency rule or regulation. In actuality, no presumption of validity today shields a rule or regulation from the close scrutiny to which judicial review now subjects agency action. Courts may properly give weight to agency expertise in some circumstances, as, for example, where complex scientific or technical issues are involved.

3. The amendment would require the government to establish the validity of a challenged rule or regulation "by a preponderance of the evidence shown." No need has been shown for such an alteration of what has been understood to be the burden of persuasion in judicial proceedings in which the validity of federal regulations may be drawn into question. The alteration would probably foster additional litigation over the validity of regulations, and no substantial public benefit could be expected to flow from the additional litigation. Moreover, the use of the term "preponderance of the evidence" is inappropriate because a court, when passing on the validity of a regulation, does not receive evidence but, rather, hears argument. At worst the wording might be read to require a reviewing court to make an independent, fresh assessment of the circumstances and data underlying the rule. On that construction, courts would find themselves obligated to redecide factual (and policy) issues affecting the validity of rules or regulations in all the myriad areas of governmental activity and not merely to decide whether rules or regulations are rationally supported. This would be a burdensome task for which courts are not suitably staffed or well-equipped by training or experience.

4. The amendment uses the phrase "rule or regulation." "Rule" by itself is defined in the Administrative Procedure Act, 5 U.S.C. Sec. 551(4), but "regulation" is not, thereby creating the potential for considerable litigation to establish the meaning of the entire phrase. Furthermore, because the amendment adds to the Government's burden in defending the validity of rules or regulations while it leaves unchanged the burden in defending challenges to the validity of other types of agency action, the amendment might have some tendency (the magnitude depending on the issues held to be encompassed by "validity") to cause agencies that have freedom of choice to proceed case-by-case rather than by adopting rules of general applicability. Any such discouragement of rulemaking would be undesirable. See Conference Recommendation 71-3.

RECOMMENDATION

1. Congress should not enact the so-called Bumpers Amendment to Section 706 of the Administrative Procedure Act or, by any similar legislation,

at this time alter or reverse any presumption of validity that attaches to agency rules or regulations.

2. An across-the board judgment that judicial deference to agency expertise or to an agency's interpretation of its statutory mandate is never warranted would be unwise, and Congress should not enact legislation precluding such deference.

RECOMMENDATION 79-7: APPROPRIATE RESTRICTIONS ON PARTICIPATION BY A FORMER AGENCY OFFICIAL IN MATTERS INVOLVING THE AGENCY

(Adopted December 14, 1979)

Restrictions on post-employment activities of former Government employees may be necessary in order to protect the Government's interest in confidential information made available to its employees, to guard against the appearance of conflict of interest on the part of its employees, and to minimize the possibility that a departed employee might be able to exert undue influence on the decisions of his former colleagues. However, such restrictions impose burdens on departing employees and, to the extent they make public employment less attactive, they burden the Government itself. Consequently, such restrictions should not be drawn more broadly than necessary to deal with the dangers realistically presented.

RECOMMENDATION

1. The problem of post-employment activities of former Federal employees is too complicated, and the distinctions between permissible and impermissible conduct too fine, for fair and effective enforcement by criminal sanctions in most cases. The primary enforcement tool for 18 U.S.C. §207 should be the administrative remedies provided by subsection 207(j), with criminal penalties reserved for clearcut and egregious violations.

2. Section 207 of Title 18 of the United States Code should be amended to limit the restrictions on post-employment activities to the following:

(a) The present permanent bar (18 U.S.C. §207(a)) on representation of a private party in any "particular matter involving a specific party or parties" in which the employee participated "personally and substantially" on behalf of the Government should be retained. However, there should be no restriction on representation, except as provided in paragraph 2(b), with respect to other matters such as those which were pending under the employee's official responsibility but as to which he had no personal and substantial participation.

(b) The present one-year ''cooling off period'' (18 U.S.C. §207(c) and (d)) on personal advocacy by former high-level personnel before their former agency is a reasonable compromise and should be retained. The one-year ban should reach only personal attempts to influence the agency, not ''aiding or advising'' private colleagues or clients, or obtaining information from the agency.

(c) Agencies should be authorized to impose, with the concurrence of the Office of Government Ethics, additional restrictions based on their particular needs, but the proposed amended Section 207 should preempt the rules of professional organizations or courts imposing additional post-employment restrictions.

3. Regardless of what action Congress takes on the above proposals, the disqualification of a former employee to act in a matter ordinarily should not extend to his firm or organization. Instead, the former employee should be barred from both personal participation in the matter and receiving compensation for anyone else's work done on it. An affidavit that the former employee is thus ''screened'' should be submitted by a partner in the firm, not as a basis for government approval, but to assure that the firm has in fact recognized the issue and taken steps to deal with it. A court should retain its authority to decide that the circumstances in a particular case require a broader disqualification. In considering whether to do so, it should give special weight to the agency's view as to whether the ''screening'' arrangement affords adequate protection to its interests.

CONSULTANT REPORTS IN SUPPORT OF RECOMMENDATIONS

79-1 THROUGH 79-7

EXECUTIVE SUMMARY OF BARRY B. BOYER REPORT. TRADE REGULATION RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION

Barry B. Boyer

A. BACKGROUND

1. Reasons for This Report

In December 1974 Congress passed the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, a statute giving the FTC broad substantive, legislative power to promulgate trade regulation rules (TRRs) designed to define and prevent unfair or deceptive acts or practices affecting commerce. Magnuson-Moss also imposes procedural requirements on the process by which these rules are promulgated. It requires the Commission to engage in "hybrid" rulemaking by adding to the notice-and-comment requirements for "informal rulemaking" under section 553 of the Administrative Procedure Act such prescriptions as oral hearings (of both the legislative and evidentiary types), more extensive provision for public comment, including rebuttal, and judicial review of the rulemaking record under a "substantial evidence" standard. Hybrid procedures represent a new approach to agency legislative rulemaking, aimed at enhancing the public's participation and testing the facts and assumptions upon which the agency bases its regulatory policy. The effectiveness and efficiency of the concept were of continuing concern to the Congress, and Section 202(d) of the Magnuson-Moss Act provided:

> The Federal Trade Commission and the Administrative Conference of the United States shall each conduct a study and evaluation of the rulemaking procedures under section 18 of the Federal Trade Commission Act and each shall submit a report of its study (including any legislative recommendations) to the Congress not later than 18 months after the date of enactment of this Act. [Congress subsequently extended the deadline to not later than June 30, 1979.]

Since the Magnuson-Moss Act was adopted, twenty proceedings have been initiated by the Commission. By April 15, 1979, only three had been completed (one by withdrawal). This study, therefore, represents an interim analysis, based on the information available early enough to report by Congress's deadline of June 1979. The Conference will continue the project to a supplemental report as soon as a sufficient number of rulemaking proceedings have been completed to provide perspective on the process as a whole.

2. *Genesis of the Magnuson-Moss Act*

While the FTC has significant responsibilities under a number of statutes, its most important activity has always been enforcement of section 5 of the Federal Trade Commission Act of 1914, which, as originally enacted, stated "unfair methods of competition in commerce are hereby declared unlawful." This law was not construed by the courts to be a consumer protection statute, and to make clear its desire that the Commission's protection extend to consumers as well as to competition, Congress, in the Wheeler-Lea Act of 1938, added a provision that "unfair or deceptive acts or practices in commerce" are also unlawful.

The Federal Trade Commission Act, originally and as amended by the Wheeler-Lea Act, contemplated that the Commission would act primarily through individual cease-and-desist adjudications. While section 6(g) gave the Commission authority "to make rules and regulations for the purpose of carrying out the provisions of this Act," until the early 1960's this provision was used only to promulgate policy statements or generic interpretations of the statute known as "Guides." The FTC began issuing these soon after its creation, and the practice has persisted until the present day. However, experience demonstrated that Guides were not wholly satisfactory as an enforcement tool. In legal effect, a Guide is merely a statement of enforcement policy, and a party charged with violating it is free to challenge the FTC's interpretation of the statute in an adjudicatory proceeding. There was little gain in efficiency over case-by-case adjudication.

In the early 1960's, the FTC began experimenting with trade regulation rules (TRR's) issued pursuant to the authority of section 6(g) after the informal notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. §553. A TRR differed from a Guide in its substantive effect upon subsequent adjudications: it was a binding determination that particular practices violated the statute, and, assuming the procedures resulting in the TRR had been proper, the only question in litigation was whether the respondent had actually engaged in the practices.

However, the Commission's statutory authority to issue such rules was ambiguous, and was eventually challenged in court. Ultimately, the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's power to issue TRRs, but during the time the issue was in litigation debate about the existence and wisdom of legislative rulemaking authority to implement section 5 of the Federal Trade Commission Act took place in the Congress.

The legislative history of Magnuson-Moss reflects widespread congressional concern over the scope of the power delegated to the Commission. The FTC was not limited to regulation of a particular industry, but had, before Magnuson-Moss, jurisdiction over all businesses "in commerce," and, after Magnuson-Moss, over all "affecting commerce." Moreover, the statutory standard governing the FTC's consumer protection activity provided few real limits. The statute proscribed "unfair or deceptive acts or practices," terms which the Commission and reviewing courts had interpreted expansively. As a result, the feeling was apparently widespread among the members of the congressional committees considering the Magnuson-Moss Act that some means had to be found to control this broad discretion. The limits which Congress considered and ultimately enacted were predominantly procedural rather than substantive; the broad rulemaking delegation was retained, but the procedures for promulgating rules were elaborated and formalized. At the same time, Congress was concerned that over-judicialization of the rulemaking process could prevent the FTC from using its trade regulation rulemaking powers effectively. The result was a "hybrid rulemaking" procedure that fell somewhere between the Administrative Procedure Act's polar categories of informal notice-and-comment rulemaking and formal rulemaking.

B. PROCEDURES FOR FTC RULEMAKING UNDER MAGNUSON-MOSS

1. *Statutory Requirements*

Except for extending the Commission's jurisdiction to matters "affecting commerce" as well as "in commerce," Magnuson-Moss did not change the substantive reach or definition of section 5. It added a new section 18 to the Federal Trade Commission Act which confirmed the FTC's authority to issue interpretive rules and general statements of policy, and, further, empowered the Commission to prescribe:

> rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a) (1)). Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

The statute also provided:

> The Commission shall have no authority under this Act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a) (1)). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

However, Congress imposed a number of procedural limitations on the Commission's trade regulation rulemaking under section 18. The Commission was directed to "proceed in accordance with section 553" of the Administrative Procedure Act, and, in addition, to comply with several special requirements:

(1) Section 553 requires simply than an agency give notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Magnuson-Moss states that the FTC shall "publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule." The substantive effect of this change is unclear, and has been the subject of debate in several rulemaking proceedings.

(2) Section 553 provides that interested persons shall have an opportunity to submit "written data, views, or arguments" unless the agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Magnuson-Moss requires the FTC to make all submissions "publicly available," and makes no provision for promulgating legislative rules without allowing an opportunity for public comment.

(3) While section 553 requires neither an oral hearing nor any opportunity for cross-examination or rebuttal, Magnuson-Moss requires the Commission to provide an opportunity for an informal hearing at which any interested person "is entitled . . . to present his position orally or by documentary submissions (or both)," and "if the Commission determines that there are disputed issues of material fact it is necessary to resolve" any interested person is entitled "to present such rebuttal submissions and to conduct (or have conducted . . .) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues." The Commission is also empowered to make rules and rulings for its hearings "as may tend to avoid unnecessary costs or delay." Specifically, it has power to group participants with common interests, and to compel selection of a group representative who will conduct cross-examination on behalf of the individual members or to require that cross-examination be conducted by the FTC official presiding at the hearing on behalf of an interested person.

(4) Section 553 requires an agency to incorporate in any final rules "a concise general statement of their basis and purpose." Magnuson-Moss requires "a statement of basis and purpose" which includes statements as to "the prevalence of the acts or practices treated by the rule," "the manner and context in which such acts or practices are unfair or deceptive," and "the economic effect of the rule, taking into account the effect on small business and consumers." Whether the omission from Magnuson-Moss of the phrase "concise, general" from the phrase "concise, general statement of their basis and purpose" has substantive importance is, again, a matter of debate.

Similarly, the impact of the statutory specification of some of the factors to be considered in promulgating a rule is unclear. This is the only portion of the statute which comes close to imposing a substantive limit on agency discretion. However, the Act explicitly provides that the "contents and adequacy" of the statement of basis and purpose "shall not be subject to judicial review in any respect.

(5) Magnuson-Moss also allows, but does not require, the FTC to provide compensation for costs of participation to any person "who has, or represents, an interest . . . which would not otherwise be adequately represented . . . " if representation of the interest "is necessary for a fair determination," and if the person "is unable effectively to participate" because he cannot afford to pay the costs. Section 553 has no comparable provision.

The Magnuson-Moss Act also specifically provides for pre-enforcement judicial review of trade regulation rules, on both the traditional Administrative Procedure Act grounds and on special grounds set forth in section 18, 15 U.S.C. §57a(e). Under the Administrative Procedure Act, an informal rule may be set aside if, as specified by 5 U.S.C. 706(2) (a)-(D), it is found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law." In addition, under Magnuson-Moss a court can set aside a trade regulation rule if it finds that "the Commission's action is not supported by substantial evidence in the rulemaking record . . . taken as a whole." The rulemaking record is defined as consisting of the rule, the statement of basis and purpose, the transcript of the oral hearing, "any written submissions," and "any other information which the Commission considers relevant to such rule"; "evidence" is "any matter in the rulemaking record." The judicial review section of Magnuson-Moss also goes beyond the Administrative Procedure Act's general provision that agency action can be reversed for procedural error by specifying that FTC rulings limiting cross-examination and rebuttal may constitute reversible error when they have "precluded disclosure of disputed material facts which was necessary for a fair determination by the Commission of the rulemaking proceeding taken as a whole.[1]

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1. In addition to these procedural modifications of notice-and-comment rulemaking, the Magnuson-Moss Act substantially increased the penalties for rule violations. A knowing failure to comply with a trade regulation rule can result in fines of up to $10,000 per day, and these penalties begin to accrue as soon as the violation takes place. Under the prior practice, penalties did not attach until the Commission had issued a final cease-and-desist order finding that the respondent had violated a TRR, and the respondent then failed to comply with the order. The Act also gave the Commission broad authority to seek restitution and other judicial remedies for consumers who have been injured as a result of violations of a TRR. These enforcement tools give trade regulation rules considerable force, and thereby raise the stakes in Magnuson-Moss rulemaking proceedings.

This summary of the hybrid features of Magnuson-Moss rulemaking suggests that Congress took two related approaches to confining agency rulemaking power. The first was to heighten the element of reasoned decision-making in trade regulation rulemaking. The requirements that a rule be based on a defined record and supported by substantial evidence compel the FTC to marshall facts supporting the issuance of a rule. At the same time the requirement that the agency state its rationale in some detail at both the beginning and the end of public proceedings implies that the FTC will have to deal rationally with the information in the record, and make explicit the logical linkage between data and conclusions. The second major feature of the statute is its apparent assumption that widespread, effective public participation will serve as a check on agency arbitrariness. The Magnuson-Moss Act goes beyond APA informal rulemaking with respect to both the quality of notice given and the scope of the right to be heard.

The requirements added by Magnuson-Moss seem to be based on a model of rule-making and the role of outside parties different from the one implicit in section 553. In the words of the Conference Report, "[M]ore effective, workable and meaningful rules will be promulgated if persons affected . . . have the opportunity . . . by cross-examination and rebuttal evidence or other submissions, to challenge the factual assumptions on which the Commission is proceeding and to show in what respect such assumptions are erroneous." [1974] *U.S. Code Cong & Ad. News* 7765.

The basic statutory objectives of allowing interested persons to challenge the basis of a proposed rule in detail, while limiting cross-examination and other hearing rights in the interest of preserving the efficiency of rulemaking, require a somewhat different strategy of implementation from the approach agencies frequently used in notice-and-comment rulemaking under section 553. Rulemaking under that section has often been treated as a loosely-structured process for fact-gathering and public statement of policy preferences—that is, as a form of decision-making in which the agency simply identified a problem, outlined possible solutions in general terms, and then sought public data, views and arguments as a means of educating itself about the subject matter. By contrast, effective implementation of the fact-testing objective of the Magnuson-Moss Act necessitates, instead of this direct "pipeline" of public views to agency decision-makers, a "funnel" approach in which agency practices and procedures are designed to achieve a progressive narrowing of the theories, factual issues, and policy considerations as the rule moves through the various procedural stages toward final decision. This "funnel" approach implies several general attributes of the rulemaking procedures: (a) more systematic, thorough investigation and consideration of rulemaking proposals than would be customary in section 553 rulemaking prior to the publication of a proposed rule; (b) more complete agency disclosure of the factual, legal and policy bases for a proposed rule than would be customary under section 553 and the general requirements of the Freedom of Information Act; (c) procedures and standards which make it possible for participants and decision-makers to narrow and focus the key matters in dispute sufficiently early in the process to permit reasonable limitations on the use of trial-type hearing procedures. At this time, it is not clear whether, or to what extent, these objectives can be achieved in the context of a broad delegation of rulemaking authority like that granted the FTC by the combination of sections 5 and 18 of the Federal Trade Commission Act. It does seem clear, however, that failure to observe these principles in agency implementation of hybrid rulemaking can impair the efficiency, acceptability, and quality of decisions.

2. *FTC Rules of Practice*

The rulemaking Rules of Practice adopted by the FTC contain several significant additions to the statutory requirements. For the prehearing stage, the principal innovation is a two-notice procedure leading to the designation of the ''disputed issues of material fact'' to be addressed at the hearing. The first notice, the Initial Notice of Rulemaking, sets forth the proposed rule or a description of the subjects and issues involved, and the requisite statement of the reason for the rule. Most initial notices have also included a list of general issues of fact, law and policy which the Commission deemed relevant to the proceeding, though this is not required by the Rules of Practice. A Presiding Officer for the oral hearing is also named at the time of publication of the Initial Notice. Publication of this first notice also triggers the participation of other interested parties by: (a) Commencing a period for prehearing public comment which lasts until 45 days before the start of the oral hearing (in practice, this period has usually lasted for several months); (b) Inviting interested persons to propose, within 60 days of publication of the notice, disputed issues of material fact to be designated as issues upon which cross-examination may be allowed at the oral hearing.

The Presiding Officer, after evaluating the disputed issue proposals, publishes a final notice of rulemaking which designates the disputed issues. While all other interlocutory appeals must be certified by the Presiding Officer, this designation is appealable directly to the Commission. The Final Notice also sets the time and place of hearings, and includes instructions for witnesses desiring to testify at the hearings. Although the Rules of Practice do not require it, these witness instructions have invariably required prospective witnesses to submit an advance text or summary of their testimony prior to the hearings so that participants could prepare for cross-examination. Since the end of the pre-hearing comment period is keyed to the start of hearings, the scheduling of hearings in the final notice also has the effect of setting the cutoff date for submission of written comments. Another function of the final notice is to advise interested persons that they must file a notification of their interest with respect to each of the disputed issues if they want to cross-examine at the hearings. These notifications of interest, which must be filed within 20 days of publication of the final notice, are intended to enable the Presiding Officer to identify groups with common interests, and thereby facilitate the selection of the group representatives who will conduct cross-examination at the hearings.

Although not required by the Rules of Practice, several other events occur during the typical prehearing notice stage. After selection of the group representatives, the Presiding Officer holds a prehearing conference to deal with procedural groundrules for the hearings and to try to resolve any scheduling problems. The prehearing conferences are not used for discovery; however, interested persons often have attempted to obtain discovery, primarily of FTC staff materials, through a variety of motions and requests for production of documents during the prehearing stages.

Another procedural right not subject to filing deadlines is the opportunity to submit requests that the Presiding Officer use compulsory process to obtain testimony, documents, or answers to questions. The Rules of Practice make the grant of compulsory process subject to some of the constraints on cross-examination and rebuttal—that is, persons requesting it are subject to the identification-of-interest requirement, and the use of compulsory process is confined to designated issues. The Rules also suggest that compulsory process is a "last resort" procedure; requests must be supported by a showing that the requested material can be obtained in no other way.

The Rules of Practice relating to the conduct of hearings add little to the terms of the statute; the broad legislative delegation of power to control the hearings and to avoid unnecessary costs and delay is redelegated to the Presiding Officer.

In contrast to the statute, which is largely silent on the topic, the Rules of Practice contain some fairly elaborate procedures for the post-hearing stages of TRR proceedings. After the hearing record closes, the Presiding Officer prepares a report containing "a summary of the record, both written and oral, relating to the issues designated" for hearing. In writing his report, the Presiding Officer is directed to "make initial factual findings and conclusions" with respect to the designated issues, "and such other findings and conclusions as he sees fit." This report is followed by a similar report prepared by the staff members assigned to the rule. The staff report contains both a comprehensive summary of the record and the staff "recommendations as to the form of the final rule." Issuance of the staff report triggers a second opportunity for interested persons to submit written comments, referred to as "post-record comments." This second comment period lasts for 60 days, and post-record comments are supposed to be "confined to information already in the record." Requests for Commission review of rulings made by the Presiding Officer also may be included in the post-record comments.

The Commission has added an additional opportunity for public participation not required by the statute. The Rules of Practice provide that the Commission may, at its discretion, allow oral presentations to the Commission before final consideration of a rule. Such "oral presentations," which have generally followed the format of a round-table discussion, were routinely allowed in the first wave of Magnuson-Moss rulemakings to reach the Commission. After the oral presentations, the Commission typically holds one or more "Sunshine meetings" to hammer out the details of the final rule, and to approve or modify the final statement of basis and purpose drafted by the staff.

The Rules of Practice contain one final provision of considerable importance. Section 1.20 says that the Commission may dispense with any procedures required by the Rules but not by the statute if it finds that they are "impractical, unnecessary, or contrary to the public interest."

C. PROPOSED TRADE REGULATION RULES

The Magnuson-Moss Act became effective on January 4, 1975. In April the Commission promulgated the Rules of Practice concerning the initial notice stages of TRR proceedings, and in August the rules for the remaining stages. By April 1976 the Commission had commenced 16 rulemaking proceedings under the Magnuson-Moss Act. After this came a hiatus until November 1977, when one additional rule was proposed, then a further gap until April 1978, after which the Commission proposed three more rules. Each of the rules proposed after April 1976 uses the escape clause of 16 C.F.R. §1.20 to make modifications in the procedures. Of these 20 rules, three have been completed—two by publication of final rules and one by withdrawal of the proposal. The rest are still in process. Their status is presented in the following chart:

STATUS OF TRADE REGULATION RULES PROPOSED SINCE PASSAGE OF THE MAGNUSON-MOSS ACT

A. Completed Rulemakings

	Rule	Notice of Proposed Rulemaking	Status as of April 15, 1979*
1.	Ophthalmic Goods & Services (Eyeglasses)	Jan. 16, 1976 (41 F.R. 2399)	Final rule published on June 2, 1978
2.	Vocational Schools	May 15, 1975 (40 F.R. 20148)	Final rule published on Dec. 28, 1978
3.	Prescription Drugs	June 4, 1975 (40 F.R. 24031)	Proposed rule withdrawn on Nov. 24, 1978
	B. Proposed Rules Before the Commission for Final Action		
1.	Residential Thermal Insulation ("R-Value")	Nov. 18, 1977 (42 F.R. 59678)	Commission met to consider a final rule on Nov. 29, 1978; Jan. 24, 1979
2.	Funeral Practices	Aug. 29, 1975 (40 F.R. 39901)	Commission met to consider a final rule on Mar. 23, 1979

STATUS OF TRADE REGULATION RULES PROPOSED SINCE PASSAGE OF THE MAGNUSON-MOSS ACT

B. Proposed Rules Before the Commission for Final Action

	Rule	Notice of Proposed Rulemaking	Status as of April 15, 1979*
3.	Care Labeling Amendment	Jan. 26, 1976 (41 F.R. 3747)	Public comments on reports were due Sept. 18, 1978
4.	Used Cars	Jan. 6, 1976 (41 F.R. 1089)	Public comments on reports were due Feb. 13, 1979
5.	Hearing Aids	June 24, 1975 (40 F.R. 26646)	Public comments on reports were due on March 29, 1979
6.	Holder in Due Course Amendment	Nov. 18, 1975 (40 F.R. 53530)	Public comment on reports were due Jan. 24, 1979
7.	Food Advertising	May 28, 1975 (40 F.R. 23086)	Public comment on reports were due Feb. 26, 1979
	C. Proposed Rules at the Post-Hearing Report-Writing Stage		
1.	Protein Supplements	Sept. 5, 1975 (40 F.R. 41144)	Presiding Officer report released July 31, 1978; BCP report not released
2.	Credit Practices	April 11, 1975 (40 F.R. 16347)	Presiding Officer report released Oct. 13, 1978; BCP report not released.
3.	Over-the-Counter Drugs	Nov. 11, 1975 (40 F.R. 52631)	Presiding Officer report released Jan. 4, 1979; BCP report not released
4.	Health Spas	Aug. 18, 1975 (40 F.R. 34615)	Hearings completed on Dec. 16, 1977
5.	Mobile Homes	May 29, 1975 (40 F.R. 23334)	Hearings completed on Jan. 31, 1978
6.	Over-the-Counter Antacids	April 6, 1976 (41 F.R. 14534)	Hearings completed on Feb. 6, 1979
	D. Proposed Rules in the Pre-hearing and Hearing Stage		
1.	Cellular Plastics	July 23, 1975 (40 F.R. 30842)	Revised Notice of Rulemaking and request for comment on need for TRR published Aug. 9, 1978
2.	Children's Advertising	April 27, 1978 (43 F.R. 17967)	"Legislative" hearing was concluded in March 1979; possible "disputed issues" hearing to be held later
3.	Games of Chance Amendment	Oct. 19, 1978 (43 F.R. 48654)	Scheduled hearings cancelled on Jan. 2, 1979, due to limited interest
4.	Standards and Certification	Dec. 7, 1978 (43 F.R. 57269)	Hearing scheduled to begin May 21, 1979

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* The usual principal stages of a Magnuson-Moss rulemaking proceeding are: (1) Initial notice of rulemaking; (2) Final notices, designating disputed issues and setting hearing sites and dates; (3) Pre-hearing comment period (from initial notice to 45 days before hearing); (4) Hearing; (5) Post-hearing rebuttal period; (6) Presiding Officer report; (7) Bureau of Consumer Protection (BCP) staff report; (8) Public comments on the Presiding Officer and BCP reports; (9) Final recommendations by Director of BCP; (10) Oral presentations to Commission by interested persons; (11) Commission meetings to consider rule; (12) Publication of final rule and statement of basis and purpose.

D. IMPLEMENTATION OF THE MAGNUSON-MOSS PROCEDURES

1. Organizational Factors

The hybrid, partly adversary nature of the Magnuson-Moss rulemaking procedures caused some difficulty in fitting the proceedings into the FTC's organizational structure. The conflicts centered around the roles of the staff attorneys and the Presiding Officers.

Responsibility for enforcing the section 5 prescription of "unfair or deceptive arts or practices" has traditionally lain with the Bureau of Consumer Protection (BCP), one of the Commission's two main operating units. The other major unit, the Bureau of Competition, is responsible for "unfair methods of competition," and has had minimal involvement in formulating substantive rules. In its consumer protection rulemaking, the BCP may obtain support services from the Commission's Bureau of Economics, which is primarily engaged in conducting research and investigations and in providing litigation support. Assistance may also be sought from legal and nonlegal personnel in the FTC's eleven Regional Offices, and on occasion a Regional Office will have primary responsibility for a rule. However, the bulk of the responsibility for investigating and proposing a TRR, for mobilizing witnesses to testify at the hearings, for cross-examining on behalf of the Commission, and for writing the staff report and the final statement of basis and purpose normally falls upon staff attorneys within the Bureau of Consumer Protection at the FTC's Washington headquarters.

To conduct the informal hearings, a corps of Presiding Officers was created within the BCP, subject to the supervision of a Special Assistant for Rulemaking. The Special Assistant, who acted as Chief Presiding Officer, reported directly to the Bureau Director.[2] In practice the Presiding Officers had considerable autonomy.

The staff attorneys were part of a separate and more complex chain of command. The team of staff attorneys assigned to a rule was headed by a managing attorney, who reported to an Assistant Director or division head. The heads of the Bureau's operating divisions had supervisory responsibility for broad subject matter areas of the BCP's jurisdiction, such as National Advertising, Marketing Practices or Special Projects. They in turn reported to the Bureau Director. A major proposal for Commission action, such as the proposal to initiate a TRR proceeding or a recommendation for a final rule, would move up this review hierarchy from the staff attorneys through the Assistant Director and the Bureau Director before it reached the Commission.

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[2] In September 1978 the Presiding Officers were transferred to the Office of the General Counsel, as was responsibility for administering the program of grants for public participation.

The Commissioners themselves were involved in the rulemaking process at several stages. First, at the beginning of an investigation the Commission had to approve the use of compulsory process. Few major efforts were undertaken without this tool, so the Commission had an opportunity to review major matters at an early stage. Second, throughout the period covered by this study the FTC was working to improve its management and budget information system, and to engage in more frequent and systematic budget reviews. Rulemaking proceedings were of course covered by these processes. Third, the Commission itself made the decision whether to propose a rule, and approved the initial notice. Fourth, any interested party could appeal the Presiding Officer's designation of issues to the Commission, and this happened in several rules. In addition, some interested parties filed motions of various kinds with the Commission, not the Presiding Officer. Some of those were referred to the Presiding Officer. Others were passed on by the Commission. Fifth, as described above, the Commission instituted a practice of hearing oral presentations before it debated a final rule. Sixth, the Commission itself, of course, approved final rules and statements of basis and purpose.

The Rules of Practice at the outset imposed no restriction on contacts between Commissioners and either other interested parties or the FTC staff in a rulemaking proceeding. Following the D.C. Circuit's opinion in *Home Box Office* the Commission prohibited *ex parte* contacts between Commissioners and their immediate staffs and non-Commission interested parties, but it imposed no restrictions on staff access to the Commissioners during the pendency of the rulemaking. The resulting situations, in which the staff could communicate freely with Commissioners while outsiders could not, was criticized by many rule opponents, who saw the proceedings as highly adversary, and the staff as single-minded advocates of the proposed rule. In March 1979 the Commission revised its Rules to allow *ex parte* contacts by outsiders as long as they are reduced to writing and made a matter of public record.

2. *Issues Involving the Basis and Scope of TRR's*

The great variety of subject-matter and remedial provisions in the rules proposed during the first four years under the Magnuson-Moss Act reflects a considerable diversity in the underlying legal theories. Confusion or uncertainty about the elements of these theories and the evidentiary or procedural consequences they entailed were a frequent source of contention in the proceedings, and it seems clear that underlying ambiguities about the nature of the decisions to be made and the weight to be accorded to different types of evidence were significant factors contributing to the procedural problems observed in this study.

As previously noted, when the Commission issues a trade regulation rule, it must consider "the manner and context in which such acts or practices are unfair or deceptive." This is, there must be some legal theory as to why the practices in question violate the Federal Trade Commission Act. In its simplest form, the legal theory of a deceptive practices complaint or rule can track a common-law fraud action. Through years of litigating deceptive practices cases within the agency and on judicial review, however, the FTC has expanded the definition of deceptive practices and evolved legal theories which are easier to prove than a common-law fraud theory. The Commission can combat not only affirmative mis-representations, but also deceptive failures to disclose. An advertising claim that is literally truthful may be prohibited if the overall impression it conveys is misleading. Actual deception need not be demonstrated; it is sufficient if the representation has the capacity or tendency to mislead. The FTC also has broad discretion in determining whether a particular claim is material to the purchasing decision. In determining deceptiveness, the Commission is not limited to considering the perceptions of educated or even average consumers; it may take account of more vulnerable groups and act to protect "the ignorant, the unthinking, and the credulous." Lack of knowledge or intent to deceive on the part of the person making the representation is no defense. In short, the FTC has broad discretion to determine what an advertisement means, and whether that meaning is deceptive.

If current agency interpretations of the law are correct, the FTC's authority to define unfair practices is even broader. Relying on the Supreme Court's 1972 decision in the *S&H* case and its own prior precedents, the FTC has begun to spell out several formulations of what constitutes unfairness in consumer transactions. Professor (now FTC Commissioner) Pitofsky has divided these theories, insofar as they relate to advertising, into three categories:

> [F]irst, claims published without reasonable prior substantiation; second, claims which tend to overreach or exploit particularly vulnerable groups; and third, instances in which sellers fail to provide consumers with information necessary to make choices among competing products.

Examples of all three types of unfairness theories, plus some additional ones, can be found in the TRR's that were pending during this study. The Hearing Aids rule has an "ad substantiation" provision which prohibits sellers from making any claims about product characteristics unless, "[a]t the time of making any such representation, the seller possesses and relies upon competent and reliable scientific or medical evidence which full establishes that each [claimed] benefit is significant and will be received by a significant number of buyers . . . . " The Credit Practices rule is based on the theory that particular substantive provisions in contracts involve the exploitation or overreaching of consumers. The initial notice in this rule points toward a rather open-ended cost/benefit analysis of the contract provisions or trade practices in question. Nondisclosure of essential information is the principal rationale for the nutrition disclosure requirements of the Food Advertising rule. According to the analysis in the staff statement supporting the proposed rule, a failure to disclose product information may be unfair when it undermines "the ability of consumers to make basic determinations concerning the product and its value, the specific uses for which it is suited, its specific relation to the consumers' particular preferences or needs, or basic considerations involved in its proper use such as the care appropriate to it."

Because nondisclosures can be deceptive as well as unfair, there is potential for overlap between the two theories. This is illustrated by the two nonprescription drug rules, OTCS Drugs and OTC Antacids, which involved the extension to advertising of FDA labeling requirements relating to claims of safety or efficacy. The initial notice in OTC Drugs sets forth a straightforward deception theory. However, a second rationale, based on an unfairness theory, is also stated. It does not follow the Food Advertising rationale of unfairness by nondisclosure, but articulates an unfairness theory which might be called the contrary-to-public-policy rationale. Under this approach, permitting sellers to make claims in advertising that were properly prohibited in labelling "would nullify important public policies basic to the regulatory scheme [of premarketing clearances by FDA] which Congress has enacted for the protection of the public health."

Thus, the unfairness doctrine, at its present stage of evolution, provides an extremely plastic, open-ended set of theories. As the OTC Drugs rule suggests, this quality can make the unfairness doctrine a convenient "safety net" for rules or rule provisions which are basically grounded in deception: if it turns out that there is inadequate record support for a deception theory, a more general unfairness rationale might be used to salvage the rule. This, in turn, can give the Commission some room to maneuver during the post-hearing stages, and it provides a way for the staff attorneys to avoid being "put to their proof" on a narrowly-defined theory. In short, the use of ambiguous, multiple theories tends to expand the scope of agency discretion. It also expands the range of matters in dispute, and the kinds of proofs that might be marshalled to influence the decision.

Ambiguity and confusion can arise not only from the theory itself, but also from the explanation of the theory—or lack of it—contained in the documents initiating rulemaking. The examples given above involve situations where the theoretical underpinnings of a rule were made fairly explicit in the initial notice or other Federal Register documents. This was not always done. The central provision of the Hearing Aids rule, for example, was the section giving the buyer a 30-day right to cancel the transaction and receive a refund. The rationale for the provision contained in the initial notice could have been interpreted as: (1) a variant of the unfairness doctrine involving failure to disclose key product attributes (which, in this case, can only be disclosed through actual use rather than verbal disclosures); (2) an unfairness theory which holds that failure to provide a trial period constitutes overreaching or exploitation of a peculiarly vulnerable group, the hearing-impaired; (3) a deception theory, if one posits that consumers of hearing aids assume that the product automatically achieves some minimum degree of efficacy, when in fact this is not the case for many consumers; (4) a self-help remedy for practices condemned on other grounds, such as false advertising or use of high-pressure sales tactics. A reader not intimately familiar with FTC law would be hard pressed even to identify these various theories. The staff investigative report is somewhat more informative; it indicates that staff apparently relied upon all of these theories, and some others as well, to support the cancellation provision. However, the staff investigative report was released only under the pressure of Freedom of Information Act requests, and prior to the release most of the detailed discussion of the theoretical basis for the rule was deleted as exempt material.

Even when the Commission's prehearing public documents do purport to state the theoretical basis of particular rule provisions, the discussion may be so vague or incomplete as to leave the reader in a state of uncertainty about the doctrinal basis of the rule provision.

Problems of theory—of defining exactly what has to be proved in a TRR proceeding—also arise in connection with the other two factors that the FTC is required to address, the prevalence of the practices in question and the economic effect of the proposed rule. That is, how pervasive do the acts or practices have to be before there is "enough prevalence" to warrant issuing a rule? And how much adverse economic impact is sufficient to defeat a rule provision? The statute, its legislative history, and agency precedents provide little guidance on this point. With respect to the determination of prevalence, as might be expected, rule supporters and rule opponents have emphasized different contextual factors affecting the "threshold of prevalence."

Staff supporting some of the rules have argued that when there is a very serious risk of consumer harm, a low or minimal showing of prevalence should be adequate. Industry spokesmen, on the other hand, argued that the required showing of prevalence varied according to the nature and severity of the remedy proposed. That is, a "definitional" rule provision which simply defined unfair or deceptive practices could be justified on a lesser showing of prevalence than a "preventive" or "fencing-in" provision which was designed to minimize the likelihood that industry members would commit unfair or deceptive acts. The distinction was based in part upon the perceived differences between an industrywide rule and an individual cease-and-desist adjudication. The proposed distinction was also based on the policy ground that imposition of uniform compliance standards when the practices were not highly prevalent would produce little benefit to consumers but could well raise the cost of doing business and the price of goods or services. Both of these kinds of arguments for a variable prevalence standard have a common-sense appeal, but "operationalizing" them into a rule of decision seems a highly subjective task.

In short, all three of the statutory factors bearing on the ultimate decision can generate open-ended theoretical premises, and the range of potentially relevant argument and proof that can be adduced to support or attack those premises may be vast. As a result, different persons can have widely divergent perceptions of the issues in a rulemaking. In the absence of some mechanism for compelling early, detailed articulation of the theoretical premises of the participants, there may not be a true "joinder of issue" until late in the process, or there may be none at all. Procedurally, the participants' varying conceptions of the theoretical framework governing the decision may give parties differing perceptions of what modes of participation are likely to be effective, and what procedural rights are crucial. In other words, the formulation of strategies and tactics of participation requires an implicit model of the substance of the decision to be made. When different participants have divergent assumptions, the likelihood of procedural conflict should increase.

A second level of possible confusion and misunderstanding concerns the degree of precision and certainty with which the FTC must make its findings. The problem arises because all of the three specific decisional factors involve aggregate or generic phenomena which, in theory at least, can be measured with some degree of scientific rigor. The understanding or behavior of consumers as it relates to claimed unfairness or deception, the prevalence of the acts or practices in question, and the economic effect of the proposed rule are all matters that can be illuminated by systematically gathering data and applying statistical or quantitative analyses. They are also matters that could be resolved by informed guess, qualitative estimation, or policy judgments. The scientific techniques for measuring consumer behavior and perceptions, or for projecting economic effects, are soft and imprecise. Even when quantitative studies are available, they are likely to be cumulative, inconsistent, or inconclusive. More pragmatically, the effort to achieve "scientific" levels of precision or certainty is likely to be prohibitively expensive and slow. The question, left unresolved by the statute and prior case law, is when (if at all) are these matters *required* to be treated in a technically precise fashion?

Even if the FTC is not required to resolve issues to a scientific certainty, there remains a distinguishable question relating to the discretion that the agency has to utilize diverse kinds of evidence. Traditionally, the Commission was able to rely upon a wide variety of proofs in cease-and-desist adjudications—or to make findings of deception without any evidence other than the dictionary definitions of words used in advertising, or its own reading of the challenged representations.

If the Commission remains free to frame broad and novel theories to support its rules, to decide issues on a best-estimate basis from an inconclusive record, and to rely on a wide variety of evidence to support its conclusions, then the procedural safeguards incorporated in the statute may seem fairly illusory. At least, the participants' ability to affect outcomes by using procedural rights may depend largely on the open-mindedness and good will of the agency. If rule-opponents believe that the agency is not in fact open-minded, they may come to view the procedures not as a realistic opportunity to challenge the rule on the facts, but rather as an opportunity to engage in tactical gamesmanship for the purpose of delaying the inevitable or building a record of reviewable procedural error. In short, procedural safeguards may not be an adequate substitute for substantive standards in controlling agency discretion, and the lack of standards may contribute to procedural difficulties.

3. *Investigational Materials*

The uncertainties surrounding the Commission's legal theories, policy analyses and evidentiary requirements were reflected in the investigations leading to the TRRs and the supporting materials developed in them. For most of the rules pending during the period covered by this study, the most striking pattern is the lack of any pattern whatsoever. There were substantial variations in every significant stage of the investigatory process. Furthermore, most of these investigations had been designed and executed with a view toward building support for cease-and-desist cases or section 553 rulemakings. When the focus was changed to Magnuson-Moss rulemaking, staff naturally tended to continue to think in a 553 frame of reference rather than in terms of the more complex Magnuson-Moss procedures, with their emphasis on testing the factual premises of the proposal.

The Commission itself has never articulated a standard to measure the work product of a rulemaking investigation, other than the terse statement in the 1978 Operating Manual that the "staff [investigative] report must provide sufficient reason for the Commission to believe that corrective action is warranted and that rulemaking is the enforcement method of choice."

Thus, for the most part, the investigational material available to support the first wave of proposed rules consisted of large quantities of almost random information collected for purposes other than that for which it was ultimately used. For purposes of a Magnuson-Moss rulemaking proceeding, collecting masses of data through subpoenas seems both overinclusive and underinclusive. Such data contain much more fine-grained detail about individual firms and transactions than would be needed to assess the general patterns and practices in the industry. At the same time, the data were not gathered in accord with accepted sampling techniques and therefore will not support systematic generalization to the industry as a whole. The experience in the first wave of Magnuson-Moss rulemaking suggests that more careful planning of the investigations can produce a more accurate and efficient proceeding in the later stages. At least, rules like Prescription Drugs or Ophthalmic Goods which started out with a clear theory and an early focus on rulemaking seemed to move more swiftly and smoothly through all stages of the process. The 1978 Operating Manual contains some suggestions which might, if thoughtfully implemented, help to minimize such problems in the future. One is the notion that staff should "consider at the outset the various enforcement mechanisms that are available"—that is, consider the possibility of developing a general rule before large quantities of information have been gathered.

Apart from its specific requirements and directives, the 1978 Operating Manual seems to be premised on the belief that staff's data-gathering during the investigative stage should be much more thorough than it was in some of the early Magnuson-Moss rulemaking investigations. In effect, the Manual encourages staff to have in hand all of the basic information it needs to support the rule before attempting to move the proceeding forward into the public stages.

However, an early focus on rulemaking is no guarantee that the investigation will be well designed and executed, especially when the investigators are attorneys who have not been trained in quantitative research methodologies. To fill this potential gap, the Operating Manual directs staff members to consult with the Bureau of Economics and to have an economist assigned when they "begin to consider rulemaking" as the preferred procedure for dealing with a pattern of unfair or deceptive practices." Even if this system works well, however, it can provide only a part of the expertise that might be needed in a particular investigation. The rules pending during this study involved a variety of technical issues in fields, such as health and nutrition, the physics of combustion and insulation, and diverse areas of consumer behavior and understanding. The FTC does not have this kind of expertise "in-house," and the process of retaining technical consultants to provide it is slow and complex. These procedural obstacles could deter staff from seeking consulting help, and might explain why the use of consultants was fairly rare in the rulemaking investigations studied.

4. *Problems in Building the Rulemaking Record*

The building of a rulemaking record begins at the earliest stages in the formation of a TRR, at the point when staff begins gathering information with a view toward developing a general rule. During the prehearing phase from the publication of initial notice to the start of hearings, two large and potentially important bodies of documents are placed on the public record: staff investigative materials, and prehearing public comments. Because Magnuson-Moss heightens the requirements for reasoned decision-making in trade regulation rulemaking and emphasizes the need for record support of the resolution of important factual issues, from the outset of the proceeding the record should be designed to be useful to decision-makers within the agency and to the court on judicial review. The prehearing record also provides a mechanism through which interested persons can exchange data, views and arguments, and thereby know the issues to be considered in the hearing and posthearing stages of the rulemaking. If the prehearing record does not serve this function the hearings are likely to be diffuse and unfocused, and the likelihood that presentations will be redundant or irrelevant will increase.

Measured by these standards, the FTC's rulemaking records had some serious problems, especially in the first wave of rules issued under the Magnuson-Moss Act. For various reasons, including FOIA, the agency tended to put all its material, which was often voluminous, on the record. There were frequent difficulties in getting material onto the public record in an orderly fashion, and once material was incorporated into the record, it was difficult to find or to use.

Two rules (Credit Practices and Mobile Homes) have to date accumulated records of over 200,000 pages. In the 14 other proceedings commenced before April 1976, the records accumulated so far range from a high of 110, 695 pages to a low of 8,377 pages, and average 40,551 pages. (Only three of these proceedings are yet complete, of course.) Processing such a large volume of paper placed severe strains on everyone concerned. The pre-Magnuson-Moss system for compiling, controlling, organizing, and indexing TRR records was plainly inadequate to the demands put upon it. This problem had not been anticipated and, once it became apparent, the agency was slow to respond. The pressure was compounded by the fact that 16 TRR proceedings were moving into the public phase of the process simultaneously between April 1975 and April 1976, and there was also pressure from the top levels of the agency and from Congress to move these TRR's along rapidly.

The size and practical inaccessibility of much record material probably contributed to the tactical maneuvering to shift the burden of proof that was observed in prehearing "motions practice" and in the group representatives' actions at some of the hearings. The task of mastering the record became expensive and difficult. For participants who were unable to overcome these burdens of time and cost, the result was less effective participation. Record materials played a minimal role in witness' preparation for hearings, and difficulties in using the record may have contributed to a tendency for each successive stage of the rulemaking process to become a separate and independent episode, with different participants submitting data or arguments that had little reference to what had been placed on the record in the earlier stages.

The second major component of the prehearing rulemaking record, the public comments, involved some of the same problems of organizing the record and making it accessible that the staff investigative materials present. However, the comments also raise more fundamental issues in the context of the hybrid Magnuson-Moss procedures. The statute specifically directs the FTC to "allow interested persons to submit written data, views and arguments, and make all such submissions publicly available"; however, it does not provide much guidance as to how these public comments are to be used in subsequent decisions on a rule. Different assumptions about the purpose of the comment record can lead to rather different conclusions about the processes that should be used to collect and analyze public comments.

The public comments contained in the TRR records reviewed during this study, as in any administrative rulemaking that attracts widespread public attention and participation, were an extremely diverse lot. One important dimension of this diversity was the extent to which the commenters tended to view the rulemaking as a political process, or as a system designed to produce a reasoned decision.

Some commenters seemed to view the TRR proceeding as a process leading toward a technical decision, and tended to address the issues "on the merits." Others seemed to regard it as a referendum on the proposed rule and participated with comments which did little except indicate their support or proposition. Still others viewed it as a political arena in which it was necessary or appropriate to use political pressure, such as congressional intervention, or to mobilize large numbers of statements of support or opposition by persons with similar interests. Finally, many either appeared not to understand the process at all or were trying to accomplish some objective other than influencing the shape of the rule.

It is not clear, under either Magnuson-Moss or FTC practice, which of these types of participation are useful or appropriate. The statute's emphasis on reasoned decisionmaking and opportunities to challenge the factual basis for the rule seems to focus the attention of the agency almost exclusively on the question whether a proposed rule is logically and factually supportable rather than on its acceptability to affected constituencies. As the rulemaking process becomes increasingly technocratic rather than democratic the preferences and value judgments of constituency groups become increasingly irrelevant.

Because so few rules have reached completion it is difficult to tell the impact of the prehearing comments on the proceedings as a whole. Clearly, however, they have not fulfilled one function that, *a priori,* one might have expected them to fulfill. They have not served as vehicles for narrowing the proceeding, focusing the issue, or setting the stage for a sharp oral hearing.

5. *Designation of Disputed Issues*

The Congress sought a procedural middle ground in which the Commission would allow some cross-examination, but could confine it to important, controversial fact issues. The principal method of providing this control was through the concept of "disputed issues of material fact" "necessary to resolve," the only type of issues on which cross-examination had to be considered. This aspect of the statute was a clear failure. The designation of issues did not, in practice, serve to confine or focus cross-examination during the initial wave of rulemaking hearings conducted under the statute, and the Commission ultimately gave up the effort to use designated issues as a means of controlling the hearings.

With the benefit of hindsight, it is possible to identify FTC policies and decisions that contributed to the irrelevance of disputed issues to the conduct of the hearings. But there also seem to be some serious conceptual difficulties in the disputed issues approach, arising primarily from the differences between trade regulation rulemaking and the other settings where a "disputed issue of material fact" standard has been used with more success.

Although the legislative history of the disputed issues language does not provide a detailed discussion of the procedural model that the statutory draftsmen were using, at least three bodies of doctrine seem relevant: (1) summary judgment in a judicial proceeding; (2) Professor Kenneth Culp Davis' distinction between specific facts which are appropriate for trial-type hearing, and general facts which are not; (3) the so-called "hybrid rulemaking" decisions in which reviewing courts required agencies to use limited trial-type procedures during informal rulemaking proceedings. In practice, none of those bodies of doctrine provided adequate guidance. Nor was the agency itself able to formulate adequate guidance for the designation of issues.

It is important to note that the FTC in general and its Presiding Officers in particular faced some strong incentives against limiting hearing rights. Threat of reversal on judicial review was a continuing concern, and without any clear doctrinal guideposts to indicate when cross-examination was necessary, the only insurance against reversal was to be liberal. Moreover, within individual proceedings it often appeared that virtually all of the major participants favored freewheeling, unfettered cross-examination. Their experience and ideology generally seemed to be litigation-oriented, and their approach to the TRR proceedings frequently mirrored this background. Not only industry representatives opposing a rule but also compensated consumer group spokesmen and, in varying degrees, FTC staff attorneys all seemed willing or eager to take advantage of whatever opportunities to cross-examine were available. At the same time, many of the Presiding Officers had had extensive experience in pre-amendment rulemaking, and some of them seemed to exhibit a marked distaste for the procedural bickering and diversion from substantive matters that inevitably accompanied attempts to limit examination of witnesses. The net effect of these differing perspectives was an expansive interpretation of the right to cross-examine, and this tendency was not counterbalanced by any pressure from the upper echelons of the FTC or from external constituencies to apply the statutory standards strictly. The Rules of Practice did not significantly elaborate the statutory standards for proposing and designating disputed issues of material fact, so this task was left in the first instance for the participants in individual proceedings. As might be expected, proposals for disputed issues came primarily from rule opponents, mostly representatives of the industry that would be regulated by the proposed rule.

Some of the more sophisticated proponents of disputed issues were trying to accomplish several tactical objectives through their submissions. First, they were careful to keep their options open (and perhaps expand the scope of the proceeding) by filing ''shotgun'' proposals which sought to put every conceivable issue in dispute. A second possible tactical objective of disputed issue proposals was continuation of the effort to obtain discovery, to pin down the evidence and theories that the FTC staff were relying on to support the rule. A third, and related, function of the disputed issues proposal was to jockey for advantage by trying to shift the burden to the FTC staff for building an adequate record on a particular proposition.

This jockeying for tactical advantage was a significant element in the issue-designation process. Counsel for the rule opponents may have believed, taking the statute and the rules of practice at face value, that a failure to propose issues could result in waiver or limitation of the opportunity to cross-examine and rebut adverse testimony. No careful lawyer would willingly give up those rights without detailed knowledge of the theories and facts supporting his opponents' positions. Yet, that kind of information often was not available, even for those who were diligent and had ample resources to search it out.

The same tactical considerations that motivated rule opponents to try to use the disputed issue proposals as a device for pinning down the theory of the rule and shifting the burden to the FTC led the rulemaking staffs to resist designation. In particular, staff attorneys seemed alarmed at the prospect that the label ''necessary to resolve'' would be attached to a large number of issues. At the same time, they had considerable difficulty trying to make sense out of the provisions of the statute and the Rules of Practice relating to issue-designation, and several vain attempts were made to clarify the statutory language in a way that would sharply limit the number of issues designated.

The net result of the Commission's failure to develop any coherent doctrine was that the Presiding Officers, who had initial responsibility for designating issues, were left with little guidance and considerable confusion. They also had a less complete grasp of the factual and theoretical underpinnings of a rule than the staff supporting the rule or the industry rule opponents, since the Presiding Officers were not appointed to conduct the rulemaking until publication of the initial notice—60 days before disputed issue proposals were due to be filed.

Left to their own devices, the Presiding Officers adopted idiosyncratic approaches to issue designation; but the general trend seemed to be toward broader formulation of designated issues. Several of the final notices designated issues which were plainly matters of legislative fact, such as consumer understanding or behavior, or the technical properties of foods or products, or the prevalence of acts or practices. Other designated issues seemed to involve policy or remedial or definitional questions, and a significant proportion of the designated issues were framed in terms of the ultimate questions to be resolved in the rulemaking. With the designated issues this compressed and open-ended, there was little prospect of using them to control cross-examination or other trial-type procedures.

The demise of the designated issues began in the Vocational Schools proceeding, the first rulemaking to reach hearing after the passage of the Magnuson-Moss Act. The Presiding Officer's attitude toward the statutory limitation of cross-examination to "disputed issues of material fact" which are "necessary to resolve" is reflected in the following statements from his post-hearing report:

> We were here dealing with another of those facile legislative phrases drafted, I suspect, by someone who never participated in a public hearing of this type but who sincerely wanted to give the Commission a device to control questioning of witnesses . . . .
>
> . . . It is one thing to cope with this concept in the drafting rooms of congressional committees, the chambers of a court or the library of a law school, where there is time and quiet to consider all the nuances. It is quite another thing to tell one when you see it. Once the action starts and the questions and answers move back and forth, I would defy the scholars to read the label on that ball while it is still in play. That is, read it without completely destroying the effectiveness of the questioning being conducted as counsel debates with the Presiding Officer not the witness.

The ultimate policy, dubbed the "freedom for time" tradeoff, allowed the group representatives to pursue any line of questioning they wished, without regard to the designated issues, so long as they kept within the time limits set by the Presiding Officer. This approach was followed, with varying degrees of success, by the Presiding Officers in later proceedings. Cross-examination was even allowed in proceedings where no issues were designated, on the theory that "limited examination of witnesses could serve a useful function in developing a complete record."

As it became increasingly obvious to all that the designation of disputed issues was irrelevant to the conduct of the hearings, the question naturally arose: why bother to designate them at all? And so, toward the end of 1977 the FTC began to experiment with radical modifications of the issue-designation process. One approach, which involved collapsing the initial and final notices into a single notice of rulemaking containing a statement of questions that the Commission would like the participants to address, was first adopted in the Thermal Insulation proceeding and later copied in the Games of Chance Amendment and Standards and Certification rulemakings. The notice in the latter proceeding makes clear that time limits, general notions of relevance, and the scope of the direct testimony are the only limits on cross-examination. Although there is not enough experience with these modified procedures to permit a general comparison to the earlier Magnuson-Moss hearings, observations of the Thermal Insulation hearings suggest that the absence of designated issues makes no significant difference in the conduct of the proceedings.

A second modification of the issue-designation process was made in the Children's Advertising rulemaking, noticed in April of 1978. Its central feature is a division of the public hearing into two sequential steps. The first stage is purely legislative hearing; no issues are designated and no cross-examination is allowed, except for questions that the Presiding Officer decides to ask as a matter of discretion. Following this legislative stage, interested persons may submit requests to cross-examine witnesses who appeared at the first hearing or to submit oral rebuttal. If these requests are granted, a separate "disputed issues" hearing will be held. Thus, the designation of disputed issues is deferred until after an initial round of informal hearings. As in the case of the Thermal Insulation procedures, it is too early to generalize about the strengths and weaknesses of this approach. However, it does seem to be quite unpopular with industry representatives who are prevented from cross-examining in the first-round hearing.

These two experimental approaches reflect a degree of ambivalence within the FTC regarding the disputed issues standard. The Thermal Insulation approach suggests a belief that it is not worth trying to limit cross-examination to "disputed issues of material fact which are necessary to resolve," while the Children's Advertising rulemaking seems premised on the assumption that the standard could work if the implementing procedures were altered. Both experiments may indicate the FTC's agreement with one of the findings noted above: that it is not possible to designate issues narrowly, or even to identify key issues accurately, until the participants and the Presiding Officer have had a realistic opportunity to master the data and theories relied upon by other participants.

The first-stage legislative hearing of the Children's Advertising proceeding is one method of trying to fill this need. An alternative possibility would be to retain the notion of designating issues at the outset of a single hearing (or series of hearings), while altering the nature and timing of the prehearing procedures so that an adequate information exchange would take place before issues were designated. At minimum, this latter approach would seem to require: (1) more orderly and complete disclosure of staff materials, including a more detailed and explicit articulation of staff's "theory of the rule" and systematic indication of the perceived relevance of staff investigative materials; (2) a comparable requirement that the major participants, the group representatives, articulate their theories and supporting data before issue-designation; and (3) a deferral of issue-designation until the prehearing comment period has closed and the participants (including the staff) have had an opportunity to evaluate and react to the comments.

6. *Discovery and Other Motions Practice*

As the rulemaking proceedings moved through the final notice step toward hearings, the matters in dispute often remained vague and unfocused. Both the staff theories supporting the rule and the designated issues were frequently framed in broad terms. The prehearing rulemaking records contained large masses of unanalyzed and inaccessible information, and in some instances significant portions of this material were still being disclosed after publication of final notice.

In these circumstances, it is not surprising that a lively motions practice developed in several TRR proceedings. The content of these motions was limited only by the ingenuity of counsel, but in general they raised four kinds of issues: (1) requests for extension of the various filing deadlines established for the proceeding; (2) motions relating to disputed issues of material fact; (3) proposals to terminate the rulemaking proceeding, or to change its scope; and (4) attempts to obtain discovery. Among these major types of motions, the discovery requests were the largest and most important category.

Potentially, at least, the prehearing rulemaking record—consisting primarily of staff investigative materials and public comments—plays a crucial role in giving substance to the participatory rights conferred by the Magnuson-Moss Act. During the prehearing stages interested persons have to prepare three kinds of submissions: prehearing comments, proposals for disputed issues of material fact, and witness testimony to be presented at the hearings. Without reasonable access to the data and theories on which the staff position is based, it can be difficult or impossible to use these participatory opportunities in a well-focused, effective manner. In essence, then, the handling of the prehearing rulemaking record may determine whether interested persons can in fact challenge the factual premises on which the Commission is proceeding, as intended by the drafters of the Magnuson-Moss Act. Moreover, to the extent that important data, views or arguments may find their way into the prehearing record, administrative shortcomings in organizing, indexing or preserving that record may frustrate the statute's goal of assuring reasoned decision-making in trade regulation rulemaking.

On a more pragmatic level, the size and complexity of the records generated in many TRR proceedings mean that seemingly trivial questions of indexing, access and copying can have a major influence on the balance of advantage in a proceeding. If an outside party can pin the staff down to a narrowly defined theory at the outset of a proceeding, force the staff to specify the evidence and argument it is relying on, and shift the cost and burden of indexing the record to the FTC, he has gained a major tactical advantage. Not only has the rule opponent greatly decreased the cost of challenging a rule, he has also probably increased the chances of defeating it, either before the agency or on judicial review. In addition, if the later stages of the proceeding should reveal that the original staff theory was slightly wrong, or that there are related acts or practices not covered by the proposed rule that should be prohibited, the rule-opponent has good grounds for arguing lack of adequate notice. Conversely, if the FTC staff can delay or prevent rule-opponents from gaining access to significant documents, force them to create their own indexing systems from scratch, and frame the legal theories broadly enough to keep the agency's options open until the posthearing stages, it can maximize the likelihood that a rule will be adopted. Thus, in many respects the key question is not so much whether it is technically possible for an outside party to obtain sufficient information to challenge a proposed rule; rather, the issue is what steps the FTC ought to be expected to take to reduce the burdens of a challenge.

Discovery attempts, besides their possible utility in creating the war-of-attrition morass so common in multi-party litigation, represented attempts by interested parties to: (a) Pin the agency down as to its facts and theories; and (b) Force the agency to analyze and index the supporting materials.

Discovery motions were not a uniform feature in all TRR's; rather, they were heavily concentrated in a few proceedings. Among the seven core rules, all of the 48 total discovery motions were filed in three proceedings. This variance among the proceedings seems to reflect differences in the general level of hostility and contentiousness between staff and rule-opponents, as well as more specific attitudes of the major participants—for example, whether staff willingly disclosed most of its investigative report and file materials, or the extent to which outside counsel were willing to accept the proposition that rulemaking should be less judicialized and adversary than a formal trial-type hearing.

Not surprisingly, in view of the strategic situation described above, all requests for discovery directed at FTC staff were denied.

A second potential discovery issue concerns discovery by one interested party directed at another. The Rules of Practice contemplate such a possibility, though under rigorously limited conditions. So far, in only one proceeding has one group representative been successful in obtaining compulsory process against another, and the experience in this instance indicates that these requests should be granted with extreme reluctance. Wrangling over this subpoena has consumed over a year, and is not yet over.

7. *Conduct of the Oral Hearings*

As TRRs moved into hearings it became apparent that many significant procedural issues were unresolved. The prehearing stages often had failed to produce consensus or even joinder of issue on the major questions of fact, law and policy; indeed, in some areas, such as discovery and designation of disputed issues, the prehearing period had simply initiated procedural disputes that carried forward into the hearings. The FTC Rules of Practice relating to the conduct of hearings contained a broad delegation of authority to the Presiding Officers, but little specific guidance. Thus, the task of giving content and direction to the hybrid hearing process envisioned by the statute fell primarily to the Presiding Officers and group representatives who were the major participants in the proceedings.

Resolving the issues was made more difficult by the fact that a Magnuson-Moss hearing, while "adversary" in some respects, differs significantly from a conventional trial-type adversary hearing in four areas:

(a) *Party Initiative and Control.* In the common-law tradition, the adversary system gives affected parties a high degree of control over fact-gathering, and over the presentation of proofs and arguments. The sole record for decision is the one which the adversary parties build themselves. In Magnuson-Moss, large blocks of material are placed on the record without overt sponsorship by the "parties" (group representatives). Witnesses and interested persons submitting comments or rebuttal have direct rights to participate and are not necessarily under the control of the group representatives. At least nominally, the FTC staff and the Presiding Officer have different roles from their counterparts in a true adversary system. The staff is charged not only with the task of presenting facts and arguments to support their position, but also with the broader obligation of building a complete record on all views and issues relevant to the rule.

Similarly, at least some of the Presiding Officers viewed their responsibilities in the hearings as broader than simply acting as the "traffic cop" to enforce procedural fairness among the group representatives. Rather, they sought to build a comprehensive, useful record for the Commission to consider in making its ultimate decision on the rule. But while they had larger responsibilities for record-building than does a judge the Presiding Officer had less clearly delineated procedural authority or "leverage" to control the hearings.

(b) *Fact-gathering vs. fact-testing.* In a fully adversary system of decision-making, the parties usually have completed the task of collecting and organizing factual material before the start of formal proceedings. An informal rulemaking hearing, on the other hand, is designed at least partly as an open fact-gathering process.

The Magnuson-Moss Act seems to assume that the hearing will contain both fact-testing and fact-gathering elements. The FTC's experience in implementing the statute suggests that it can be difficult to reconcile these two objectives within the confines of a single oral hearing.

(c) *Procedural formality of judicializiation.* Another characteristic of a classical adversary system is the existence of an elaborate body of procedural and evidentiary rules to govern the conduct of the proceedings. No such body of rules existed for hybrid rulemaking, and neither the statute nor the Rules of Practice nor general legal concepts provided guidance as to how formalized a hybrid proceeding should be. There were frequent procedural disputes in some of the hearings, and numerous attempts by counsel to move the process further toward the adversary trial model. The Presiding Officers generally tried to resist ''judicializing'' the procedures.

(d) *Polarization and contentiousness.* An adversary system seeks truth through confrontation. This implies a substantial measure of contentiousness, if not hostility, between the contending adversaries. By contrast, informal rulemaking, as it was conceived at the time of the Administrative Procedure Act, is a decision-making process that relies heavily on consultation to try to find common ground among the affected interests, rather than on confrontation. As the rulemaking procedures become more formal and trial-like, they may tend to polarize the positions taken by the parties, and make a consensual resolution or an acceptable modification of the rule less likely.

As a general proposition, the conduct of the oral hearings represented a working out of the interaction of these uncertainties about the nature of the proceedings with the pre-existing substantive uncertainties about the legal, theoretical, and factual bases of the proposed rules.

The Presiding Officers, working in a context in which the crucial issues and evidence, and, indeed, the very purpose of the oral hearing, were poorly defined, tried to accommodate the various demands placed upon the proceedings by the interested persons and the FTC staff. They tended to emphasize the fact-gathering function over the fact-testing, and minimized procedures that would preclude or circumscribe witness testimony. Most of the time spent on hearings was devoted to questioning and cross-questioning witnesses (as contrasted with delivery of statements), but the amorphous nature of many of the initial witness statements, combined with the unlimited scope of cross-examination inherent in broad issue designations and the freedom-for-time trade-off, tended to downgrade the fact-testing function. Cross-examination often turned into a credibility attack on the witness, quarreling with his right to have an opinion rather than testing specific assertions.

Cross-examination was most useful to the record when used in connection with expert testimony, not because it discredited the witness—such a conclusion was rare—but because it gave experts an opportunity to expand their views and explain them in lay terms. Perhaps the strongest case for cross-examination as a fact-testing device is its utility in exposing methodological shortcomings or problems of interpretation in survey research testimony.

E. Conclusion

This phase of the Conference's study has covered the process of rulemaking under Magnuson-Moss only through the hearing stage. A supplemental study discussing the post-hearing procedures will be completed at a later time. Proposed recommendations covering these initial stages of rulemaking have been forwarded to the Conference for its consideration. No recommendations on the statute itself have been prepared, though such recommendations may be appropriate at the conclusion of the supplemental study.

REPORT IN SUPPORT OF RECOMMENDATION 79–2

PROCEDURES USED IN FORMING AND CARRYING OUT FEDERAL-STATE AGREEMENTS UNDER THE SUPPLEMENTAL SECURITY INCOME PROGRAM

Peter W. Martin

PART 1. INTRODUCTION

A. Background

For over forty years, welfare has been a joint enterprise of Federal and state governments. The mechanism for cooperation has been Federal grants-in-aid to state programs serving specified categories of the poor—dependent children, the aged, the blind, the disabled. "Cooperative federalism", the late Chief Justice Earl Warren labelled it in the Supreme Court's first welfare decision, *King v. Smith,* decided in 1968.[1] He then went on to outline the basic terms of cooperation:

> The AFDC program . . . is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education, and Welfare (HEW). . . . The plan must conform with several requirements of the

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[1] King v. Smith, 392 U.S. 309 (1968).

> Social Security Act and with rules and regulations promulgated by HEW. . . .[2]

This grant-in-aid approach has hardly been peculiar to welfare. A similar combination of Federal money and standards together with state or local initiative and administration has been employed to furnish medical services to the indigent (Medicaid), to construct interstate highways, to demolish and rebuild depressed urban areas (Urban Renewal) and to carry on countless other local activities of national interest. However, among those numerous and diverse programs welfare has, for two decades at least, been one of the most costly.[3] One recent study characterized "welfare finance" as "the leading edge of the movement toward fiscal interdependence between levels of government."[4]

After so many years of service, the grant-in-aid approach to welfare may be ending. Recent welfare reforms, both enacted and proposed have abandoned it. In 1972, Congress replaced grant-in-aid support for state programs of assistance to the needy elderly, blind and disabled (OAA, AB, and APTD) with a Federally administered cash program for the same groups of the poor—the Supplemental Security Income Program or SSI. Recent comprehensive welfare reform proposals, including President Carter's Program for Better Jobs and Income, would supplant or severely modify the use of grants-in-aid to support welfare programs on a much broader basis.[5]

While the SSI model of Federal welfare support seems, at first glance, to represent the shift from a cooperative Federal-state program to one which is solely the responsibility and concern of the Federal government—like Social Security (OASDI) and Medicare, Federal money, Federal eligibility and benefit standards, Federal administration—that is not the full picture. State welfare programs for the elderly, blind, and disabled have not been totally displaced by SSI. The level of the Federal benefits (well below those many states were paying under the predecessor grant-in-aid programs) those many states were paying under the predecessor grant-in-aid programs) and the extreme simplification of its aid formula leave substantial room or need for supplementary state assistance. Initially, states were simply encouraged to supplement the Federal amounts, but subsequent amendment to the 1972 legislation require them to do so in amounts based upon prior welfare expenditures. (The requirements are imposed as a condition for continued state receipt of Federal grant-in-aid support for its Medicaid program.)

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[2] *Id.* at 316-17.

[3] Total Federal grant-in-aid support of state and local government programs grew from $7 billion in fiscal year 1960 to approximately $70.5 billion in fiscal year 1977. 2 *Advisory Commission on Inter-governmental Relations, Significant Features of Fiscal Federalism 1976-77,* Table 38, at 55 (1977). Among the sectors of specifically supported activity (as distinguished from revenue sharing), public welfare programs accounted for the largest expenditure. *Id. See also Social Security Bulletin, Annual Statistical Supplement, 1975,* Table 24, at 58.

[4] *E. Hamilton & F. Rabinovitz, Whose Ox Would Be Healed? The Financial Effects of Federalization of Welfare* (Welfare Policy Project 1977).

[5] H.R. 9030, 95 Cong., 1st Sess. (1977). *See also* H.R. 10950, 95th Cong., 2d Sess. (1978) (the House Special Welfare Reform Subcommittee's version of the administration bill).

The ABLE plan which resulted from the Public Welfare Study of the Subcommittee on Fiscal Policy of Joint Economic Committee had this same structural feature. *See Subcomm. on Fiscal Policy of Joint Economic Comm., 93d Cong., 2d Sess., Income Security for Americans: Recommendations of the Public Welfare Study* (1974).

What is startlingly new is that most of these supplementary, state-funded benefits (measured either by dollar amount or number of states) are administered by the Federal government. The Social Security Administration, which handles the basic SSI program, administers these state-funded supplementary benefits as well. Indeed, the two benefits (Federal and state) are included in a single check to the recipient. That turn about, which now has state monies flowing to a Federal agency for its disbursement (where previously just the reverse occurred), is authorized by this brief portion of the 1972 legislation:

> (a) . . . .
>
> [T]he Secretary and [a supplementing] State may enter into an agreement . . . under which the Secretary will, on behalf of such State (or subdivision) make such supplementary payments. . . .
>
> (b) Any agreement between the Secretary and a State entered into under subsection (a) shall provide—
>
> (1) that such payment will be made . . . to all individuals residing in such State (or subdivision) who are receiving benefits under this title [SSI], and
>
> (2) such other rules with respect to eligibility for or amount of the supplementary payments, and such procedural or other general administrative provisions, as the Secretary finds necessary . . . to achieve efficient and effective administration of both the program which he conducts under this title and the optional State supplementation.
>
> . . . . .
>
> (d) Any State which has entered into an agreement with the Secretary under this section which provides that the Secretary will, on behalf of the State (or political subdivision), make the supplementary payments to individuals who are receiving benefits under this title (or who would but for their income be eligible to receive such benefits), shall, at such time and in such installments as may be agreed upon between the Secretary and such State, pay to the Secretary an amount equal to the expenditures made by the Secretary as such supplementary payments.[6]

Two very strong inducements led most states to enter such agreements.

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[6] 42 U.S.C. § 1382e (Supp. V 1975).

First, Federal administration cast the cost of administering the state supplementary benefits on the Federal government; the state, thus, had to pay only for the benefits themselves. Second, important to only a handful of states, but precisely those with the largest rolls and highest benefits, was a "hold harmless" guarantee tied to the election of Federal administration. That guarantee assured high benefit states (like New York, California, and Massachusetts) that, to the extent they were only supplementing to levels paid under the predecessor grant-in-aid assistance programs and not choosing to go higher, they need spend no more than under the grant-in-aid matching formula, any additional benefit cost being borne by the Federal government.

As a result of these incentives, over half the states entered agreements providing for Federal administration of supplementary benefits paid under state law and out of state funds.[7] During 1976 approximately $1.4 billion in benefits were disbursed by the Social Security Administration pursuant to such agreements.[8] The amount is significantly smaller than the $4.5 billion paid in basic Federal benefits during the same period, [9] and the $2.1 billion in Federal money distributed to the states under the three predecessor grant-in-aid programs in fiscal year 1973.[10] But one doesn't have to go back very many years to find less Federal money flowing through state assistance programs for the elderly, blind and disabled than now flows from the states through the Federal government to the same population.

This new form of Federal-state cooperation has had a tumultuous early life. The Social Security Administration (SSA) had only a little more than a year's lead time to gear up for running the basic SSI benefit program and to reach agreements with states desiring Federal administration of their supplements. Furthermore, Congress kept tinkering with the legislation during this period.

No ready-made forms existed for the administration agreements. Being a novel relationship, it did not fit comfortably into established legal or administrative categories. Once agreements were executed and the program was underway, very serious disputes about the parties' respective responsibilities and liabilities arose. Again, the novelty of the relationship led to uncertainty over where, when, and how these disputes should be resolved.

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[7] Thirty-one states (counting the District of Columbia) had agreements for the first half of 1974. Since then there have been a few additions and drop outs. The figure for 1977 was 27.

[8] *Office of Research and Statistics, Social Security Administration, Program and Demographic Characteristics of Supplemental Security Beneficiaries, December 1976,* Table A, at 4 (1977). This compares to $168 million supplementary benefits over which states retained administration. *Id.*

[9] *Id.*

[10] *See Staff of Subcomm. on Fiscal Policy of the Joint Economic Comm., 92d Cong., 2d Sess., Handbook of Public Income Transfer Programs* 102, 120, 128 (Studies in Public Welfare, Paper No.2, 1972).

B. This Study

1. Scope

This study undertakes first to analyze the basic legal relationship created by the provision for Federal administration of state supplementary benefits. Its focus is on disagreement. What sorts of disputes are—given the relationship—inevitable or likely to arise? What sorts have arisen? What procedural path do statute, agreement, and relevant Federal court jurisdictional provisions chart for them once they do arise?

The legal framework at the center of these several kinds of controversy is a contract or, in the words of the statute, an "agreement" between the Secretary of HEW and a state. That suggests a dichotomy between disputes arising under or during the course of such an agreement and those which concern agreement formation. This study will concern itself with both phases, examining: (1) the procedures used to develop the terms on which the Federal agency would contract ("enter into an agreement") to administer state benefits (both the original "Model Agreements" and subsequent years' revisions); and (2) the procedures available, post-agreement, to resolve disputes between the parties over liability, performance, and contract interpretation.

Numerous other "agreements" between a state and the Secretary of HEW are provided for in the SSI legislation, as amended—the state's agreement to furnish the mandatory supplementary benefits,[11] an agreement under which Medicaid eligibility determinations for the SSI population will be made by the Social Security Administration,[12] an agreement setting up an arrangement for reimbursement to the state for assistance furnished an applicant pending receipt of SSI benefits (an "interim assistance agreement"),[13] an agreement committing the state to a continuing level of supplemental benefits.[14] While this study focuses on the agreement for Federal administration of state supplementary benefits, the procedural questions it explores bear on these other agreements as well.

2. Approach

The necessary starting point for this study is a review of the statute which established this new form of "cooperative federalism." Part 2 of the report, which follows this introductory part, scrutinized the terse language of the SSI statute itself, and also traces the Congressional deliberations which preceded the 1972 legislation and subsequent amendments in a search for more detailed evidence of Congressional intent. What general purposes motivated the establishment of this new form of Federal-state legal relations? Was there any suggestion as to how HEW and the states were to come to "agreement?" Was there any anticipation of the potential for intergovernment disputes and the need for procedures to resolve them?

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[11] Pub. L. No. 93-66, § 212, 87 Stat. 152 (1973).

[12] 42 U.S.C. § 1383c (Supp. V 1975).

[13] 42 U.S.C. § 1383(g)(4) (Supp. V 1975).

[14] Pub. L. No. 94-585, sec. 2, § 1618, 90 Stat. 2901 (1976).

In addition to pursuing such questions, Part 2 describes the continuing Congressional attention to the program during the period in which the Social Security Administration and the states were racing to implement the original legislation—attention which not only produced amendments drastically altering the nature of the Federal administrative undertaking but disrupted the "agreement-formation" process.

Part 3 explores how the parties worked with each other during 1973 to achieve the original set of agreement terms for Federal administration of state benefits and also how subsequent revisions of those terms were handled. It investigates which matters were dealt with by formally promulgated Federal regulations, which through "Model Agreements" negotiated with a contract committee comprised of state representatives, and finally which through state-by-state negotiation. Because of the importance of the "Model Agreements" Part 3 carefully analyzes the successive negotiations on their terms—noting the issues raised by the parties (including, in the case of post-1973 negotiations, the impact of the parties' experience with the program on those issues) and how those issues were ultimately dealt with.

Part 4 turns to the disputes which have arisen under the agreements. It summarizes the areas of controversy over performance and interpretation and their treatment under the "disputes" paragraph of the Model Agreements.

In Part 5, the SSI Federal-state administration agreements and associated disputes are set against relevant Federal statutes which apply to agency decision making and dispute resolution, including those which establish and limit jurisdiction in the Federal courts. The question which underlies the section is whether, and if so where, these agreements and disputes concerning them fit into such general Federal law.

The concluding section of the report, Part 6, compares the procedures for resolving Federal-state disagreements under SSI's new form of "cooperative federalism" with those applicable to the grant-in-aid programs. Building on that comparison, the part next presents an evaluation of the procedures which have been used in establishing and maintaining this new arrangement. That evaluation leads to several recommended changes in current SSI procedures.

3. *Importance*

The agreement for Federal administration of state-funded benefits introduced by the 1972 SSI legislation is a novel intergovernmental arrangement. Implementing that arrangement required and received a great deal of creative improvisation on both sides—state and Federal. This report on what has emerged from SSI's early years—the formative years of that arrangement—furnishes encouraging evidence of the capacity for innovation in our Federal system. The major responsibility for making this novel arrangement work fell on the Social Security Administration of HEW and the states, Congress having given these matters very little attention. The surprising fact is not that there is room for improvement in what they devised during a period of great administrative pressure and confusion, but that they did so well. The improvements recommended in this report represent, overall, modest adjustments to the procedures which have emerged from that start-up period. Clearly, the relationship can be improved. The sort of procedural changes recommended in this report ought to succeed in reducing friction and tension in the case of states currently entrusting administration of an SSI supplement to the Social Security Administration; they may even encourage some of the states which have clung to state administration of supplements to enter or re-enter agreements with the Federal agency.

Beyond impact on the successful functioning of SSI, itself a major program, this report and the issues it explores have direct bearing on proposals for "comprehensive welfare reform." SSI furnishes one obvious structural model for plans designed to replace AFDC with a more universal cash benefit program assuring at least a minimum, uniform level of payments nationwide. The degree of confidence which the states have in the Federal-state relationship under SSI—including its capacity for fair resolution of intergovernmental differences—is likely to have a major influence on whether that model or simply a variant of the grant-in-aid approach becomes the vehicle of such "welfare reform." If the SSI model is followed, the issues addressed in this study will have to be faced by Congress, Federal agency and the states in connection with a welfare program many times the size of SSI.

PART 2. THE STATUTORY FRAMEWORK

A. *Language of the Act Itself*

1. *Agreement Formation*

The 1972 SSI legislation provided (HEW) and the states little guidance and even less time as they faced framing this totally new form of intergovernmental arrangement.[15] It described the arrangement simply as "an agreement . . . under which the Secretary [of HEW] will, on behalf of [a] state

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[15] The act specified an effective date only fourteen months after enactment (January 1, 1974) although it did offer HEW the option of deferring Federal administration of the basic SSI program and necessarily state supplements as well, by requiring states if requested to enter into agreements with HEW for administration in whole or part of the basic benefit during a one and a half year transition period. Social Security Amendments of 1972, Pub. L. No. 92-603, § 402, 86 Stat. 1329, as amended by Pub. L. No. 93-233, § 18 (i), 87 Stat. 947.

. . . make . . . supplementary payment,''[16] furnishing little detail as to the content of the agreement and none concerning appropriate procedures for developing the necessary terms and conditions. The statute laid a few limits on what the Federal agency could ''agree'' to do (make ''cash payments . . . on a regular basis to individuals . . . receiving [SSI] benefits or who would but for their income be eligible to''),[17] set limits on state eligibility rules HEW would enforce,[18] authorized states to disregard income counted for SSI purposes,[19] and spoke tersely of the state's necessary fiscal undertaking: ''Any State which has entered into an agreement [for Federal administration] . . . shall, at such times and in such installments as may be agreed upon between the Secretary and such State, pay to the Secretary an amount equal to the expenditures made by the Secretary as such supplementary payments.''[20] More elaborate provisions spelled out the ''hold harmless'' ceiling on state reimbursement liability.[21]

Wide discretion to fill in the details was explicitly left to HEW. The statute stated that agreements would include ''such other rules with respect to eligibility for or amount of the supplementary payments, and such procedural or other general administrative provisions, as the Secretary finds necessary . . . to achieve efficient and effective administration of both [SSI] and the optional State supplementation.''[22]

It was reasonably clear from the full statutory scheme, however, as well as its legislative history (discussed in the following section) that Federal discretion was not total and that efficiency of administration was not to be HEW's sole consideration during the shaping of such agreements. The very term ''agreement'' connoted some mutuality in the process. Moreover, substantial financial benefits were coupled with Federal administration, which both reflected a Congressional desire to induce states to elect Federal administration and gave rise to legitimate state claims for reasonable accomodation of their interests in the course of coming to ''agreement.''

''Mandatory supplement'' legislation enacted midway through 1973[23] required states to supplement SSI payments for all those covered by the predecessor programs to the extent necessary to assure they did not experience a benefit reduction once SSI began. That act also provided for Federal administration by agreement. It established Federal administration under "an administration agreement with the Secretary" as an option for "any State" providing mandatory supplements.[24] Since those supplements necessarily reflected all of the special needs grants, income exclusions, and so forth which were part of 1973 state grant-in-aid programs their administration by the Federal agency raised a range of potential problems not presented by optional supplements. Inefficient though the administration of such "grandfathered" provisions might be, the statute did not leave HEW free (as it was with a state's optional supplement) to decline to enter into an administration agreement. States had no choice (if they wished to retain Federal support for Medicaid) but to establish a supplementary benefit program that for existing recipients preserved all the quirks and intricacies of their prior programs; and HEW was obliged, upon state request, to "enter into an administration agreement . . . whereby the Secretary [would], on behalf of such State, make the [required] supplementary payments."[25]

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[16] 42 U.S.C. § 1382c(a) (Supp. V 1975). [All of the statutory provisions central to this report are contained in Appendix A.].

[17] *Id.*

[18] ''Any agreement . . . shall provide . . . that such payments will be made (subject to [duration residency requirements allowed under a following subsection]) to all individuals residing in such State (or subdivision) who are receiving [federal SSI benefits] . . . '' 42 U.S.C. § 1382c(b) (Supp. V 1975).

[19] 42 U.S.C. § 1382c(c) (2) (Supp. V 1975).

[20] 42 U.S.C. § 1382c(d) (Supp. V 1975).

[21] *See* Pub. L. No. 92-603, § 401, 86 Stat. 1329 (1972), as amended by Pub. L. No. 93-233, § 18(h), 87 Stat. 947 (1973.)

[22] 42 U.S.C. § 1382c(b) (2) (Supp. V 1975).

[23] Pub. L. No. 93-6, § 212, 87 Stat. 152 (1973).

In language similar to that contained in the 1972 act, the mandatory supplement provisions required that "any State which has entered into an administration agreement . . . shall, at such times and in such installments as may be agreed upon between the Secretary and the State, pay to the Secretary an amount equal to the expenditures made by the Secretary as supplementary payments to individuals entitled thereto."[26]

In addition, the act listed two other state obligations to be reflected in the agreement:

> Any such administration agreement between the Secretary and a State . . . shall provide that the State will (A) certify to the Secretary the names of each individual who, for December 1973, was a recipient of aid or assistance (in the form of money payments) [under one of the predecessor programs], together with the amount of such assistance payable to each such individual and the amount of such individual's December 1973 income [both necessary to determine the level of mandatory support], and (B) provide the Secretary with such additional data at such times as the Secretary may reasonably require in order properly, economically, and efficiently to carry out such administration agreement.[27]

2. *Post-Agreement Disputes*

Neither the 1972 legislation or any of the numerous subsequent amendments addressed post-agreement disputes—that is, disagreements between states and the Federal agency over compliance with the terms of their administration agreement, the regulations, or statute. The statute is totally silent concerning the administrative and judicial remedies available to either party to such a dispute. It does include a section entitled "Hearings and Review" that outlines a right to notice and hearing, followed by judicial review of final determinations of the Secretary; but the section's terms clearly apply only to disagreements between individual claimants of SSI benefits and the Federal agency.[28]

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[24] Id. § 212(b)(1).
[25] *Id.*
[26] *Id.* § 212(b)(3).
[27] *Id.* § 212(b)(2).

B. Legislative History

1. The Original 1972 Legislation

The Supplemental Security Income Program (SSI) was enacted in late 1972 by a Congress preoccupied by, though ultimately unwilling to accept, more comprehensive welfare reform proposals. Consequently, although the program was hailed soon after enactment as "the most significant Federal civilian program since the introduction of Medicare in 1966, and one of the largest scale efforts in civilian history,"[29] SSI's conception and birth received startingly little attention. From 1969 through 1972 nearly all eyes were on President Nixon's Family Assistance Plan (FAP) which would have replaced Federal grants-in-aid to state programs of Aid to Families with Dependent Children (AFDC) with a purely Federal benefit program augmented by state supplements. The degree of parallel reform to be worked on Federally supported state programs for the so-called adult categories—Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled—was a matter which received low-level, though continuing attention as the political battles over FAP surged back and forth. While Congress ultimately failed to enact FAP, it did vote to replace the grant-in-aid programs for the adult categories with SSI, an FAP-like scheme.[30]

Because of Congressional preoccupation with the Family Assistance Plan, the legislative history of SSI itself offers little insight on most of the points of program architecture which are the focus of this study.[31] Some

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[28] 42 U.S.C. § 1383(c) (Supp. V 1975).

[29] *HEW, Annual Report of the Social Security Administration for Fiscal Year 1974,* at 13 (1975).

[30] Pub. L. No. 92–603, § 301, 86 Stat. 1329 (codified at 42 U.S.C. § § 1381–1883-c(Supp. V 1975).

[31] The critical point for the legislation was the Senate where FAP failed, having passed the House twice. SSI, however, was approved by the Senate because needy, blind, aged, and disabled adults were seen as more deserving of help than poor families, because it did not cause as much or add as many new recipients to welfare rolls, and, most important, because the attention of the Sentate was focused almost completely on the proposed programs for families. Describing action on the Senate floor, [Senator] Ribicoff's legislative assistant said,

> people were so concerned about Title IV (the family provisions) that no one paid any

administrative issues germane to SSI were debated in the context of FAP; but even if one borrows from the record of consideration given to FAP, the basis for determining legislative intent on how the administration agreements should be formed or operate subsequently is extremely meager.

SSI's novel provision for Federal administration of state supplementary benefits coupled with Federal mandate of specific levels of state supplementary support were not part of President Nixon's original reform plan for the adult categories. From the start, however, they were features of at least some of the versions of the family program (FAP) being considered by Congress and the Administration.

As passed by the House in 1970, the first FAP bill, H.R. 16311, provided in connection with Family Assistance or FAP that:

> The Secretary may enter into an agreement with any State under which the Secretary will make, on behalf of the State, the supplementary payments provided for under Part E, or will perform such other functions of the State in connection with such payments as may be agreed upon, or both. In any such case, the agreement shall also (1) provide for payment by the State to the Secretary of an amount equal to the supplementary payments the State would otherwise make pursuant to Part E, less any payments which would be made to the State under section 453 (a) [which provided for Federal grant-in-aid support of state supplementary payments], and (2) at the request of the State, provide for joint audit of payments under the agreement.[32]

> attention to Title III (provisions pertaining to aged, blind, and disabled adults). If SSI had been on its own it would never have made it. Also, it passed because it looked like peanuts next to the family programs.

A Senate Finance Committee staff member told a reporter that "during conference the SSI barely captured the conferees' attention." *M. Bowler, The Nixon Guaranteed Income Proposal* 147 (1974).

Reviewing the same record V.&V. Burke conclude that the controversy surrounding FAP "probably helped passage" of SSI:

> The welfare revolution embodied in SSI escaped detection because few read the plan, because few understood the welfare status quo well enough to appreciate the plan; because many interpreted the triple endorsement of Richard Nixon, Wilbur Mills, and Russell Long as a guarantee that the plan was modest.
>
> Except for the few persons who engineered it and for governors, who anticipated savings from its federally paid floor for the aged, blind, and disabled, few knew what was in Title III of H.R. 1.

V. Burke & V. Burke, Nixon's Good Deed: Welfare Reform 197 (1974).

Preoccupation with replacing AFDC characterized the 1969-72 welfare reform effort from the start. President Nixon's August 8, 1969 television address on welfare reform devoted only one sentence to the adult programs. *See id.* at 112.13

[32] H.R. 16311, 91st Cong., 2d Sess. § 461(a)(1970).

A following section authorized reverse agreements under which states would assume all or part of the administration of the basic Federal family benefits.[33]

As Professor Joel Handler noted in 1972:

> The [bill] left the federalism issue hanging in mid-air. It created three possibilities: (1) HEW would contract with a state to administer FAP along with the state supplementation program; (2) HEW could contract with a state to have HEW administer the state program; or (3) in a particular state, HEW could administer FAP and the state could administer its program. The third alternative is called the "two-window" option, as the recipients would be compelled to pick up checks at two different windows. The other two options are "one-window" plans, but the question is *whose* window? Not only is maximum flexibility created by the three options, but presumably the choices are subject to negotiation and bargaining on a state-by-state basis . . . .
>
> The [second option] (that of the federal government administering the state supplement program) is a completely novel idea in American federal-state regulations [sic]. It is the only example of "up-stream" delegation—that is, from the states back to the federal government—that I know of.[34]

Equally unprecedented was a mandatory FAP supplementation provision contained in H.R. 16311. States were required to supplement the basic Federal benefit up to the state's AFDC standard of need "as in effect for January 1970" or the poverty level, if lower. Failure to do so would cost the state the loss of all Federal grant-in-aid support under several Social Security Act titles, including the adult programs and Medicaid.[35]

That mandate proved sufficiently unpopular that it was removed in the following year's version of the legislation. (H.R. 16311 died in the Senate with the adjournment of the 91st Congress). H.R. 1, as reported by the House Ways and Means Committee in May 1971 and passed by the House June 22, 1971, did not discourage state supplements but neither required nor subsidized them.[36]

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[33] *Id.* § 461(b).

[34] *J. Handler, Reforming the Poor* 114 (1972).

[35] H.R. 16311, 91st Cong., 2d Sess. § 451 (1970). According to a reliable account this was the product of a last-minute insertion in President Nixon's August 8 speech by HEW. The critical sentence assured that under FAP: "In no case would anyone's present level of benefits be lowered." *See V. Burke & V. Burke, Nixon's Good Deed: Welfare Reform* 113-15 (1974).

[36] While the administration stood behind the original mandatory supplement requirement during negotiations with the House Ways and Means Committee over H.R. 1 in 1971, the Ways and Means Committee itself was sharply divided. On the one side were "liberals, especially Corman, Carey, and Burke, [who] wanted a provision that would mandate state supplementation up to current payment levels in order to protect present recipients against a loss of benefits . . . [and also] wanted the Federal Government to pay part of the cost of this supple-

A "hold harmless" assurance, however, applicable to all programs (those for the aged, blind and disabled as well as families) provided that if the state supplemented (with Federal administration) the Federal government would pick up any increase in total state welfare expenditures over the level for calendar year 1971, to the extent that the increase was not caused by supplementation to higher payment levels than were in effect for January 1971.

The 1971 House bill also, for the first time, cast the adult programs in the same form as FAP. The Nixon Administration's initial welfare reform bill, H.R. 14173, introduced in October 1969, and the version passed by the House in 1970, H.R. 16311, both left the adult categories in state hands but would have imposed a nationwide minimum payment level and uniform national eligibility standards.[37] They sought simply to improve the adequacy and equity of the existing grant-in-aid programs without requiring alteration of their basic structure. An opportunity for structural change (one-window Federal administration) was contained, however, in a provision which gave states the option of having their adult programs administered by the same Federal agency that would be making Family Assistance Plan payments. H.R. 16311, § 1605 would have authorized the Secretary of HEW to

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ment and thereby increase the financial savings that states like California, New York, and Massachusetts with higher welfare payment levels and expenditures would realize under H.R. 1." *M. Bowler, The Nixon Guaranteed Income Proposal* 98 (1974). On the other side were the Republicans and conservative Democrats, led by the senior minority member of the Committee John Byrnes:

> Byrnes opposed [mandated supplements with federal cost-sharing] for budgetary reasons but most important, for reasons of administrative efficiency and control. He was "tired of governors and mayors complaining to him about the Federal Government's forcing them to spend money on federal programs," and he did not want another federal-state welfare program with dual administrative structures, responsibilities, and matching funds. He wanted the federal program to be completely federal. The states, then, could do what they wanted without any pressure or interference from the Federal government, so long as they did nothing to undermine the principles and objective of the federal program.

Id.

Committee Chairman Wilbur Mills' position that supplements should not be required but that large benefit states should receive Federal reimbursement to the extent their supplementation costs exceeded 1971 welfare expenditures (the so-called "hold harmless" provision) found the middle ground. Mills also added on the floor of the House an amendment that purported to require positive action by a state legislature for the state *not* to supplement. *See id.* at 74, 99; 117 Cong. Rec. 21460-61 (1971).

[37] To offset the possible adverse fiscal consequences for some states of these new adult category requirements (which were combined with a new grant-in-aid formula), the original bill contained an assurance that the combined reforms—FAP and the adult category changes—would not increase a state's welfare expenditure. The so-called 50–90 provision required a state, for a five year period, to continue spending under the new combination of programs at least 50% of what it would have spent under the old, but at the same time set a ceiling of 90%. (In other words all states were guaranteed, under the second half of the provision, at least a 10% reduction in welfare costs.) *See M. Bowler, The Nixon Guaranteed Income Proposal*27(1974).

"enter into an agreement with a State under which he will, on behalf of the State pay [adult category] aid directly to individuals in the State under the State's plan . . . and perform such other functions of the State in connection with such payments as may be agreed upon." (Because these programs would have still be in the grant-in-aid form, the Federally paid state benefits subject to such agreements would have been payments partially supported by Federal funds.)[38]

This approach, seeking reform of the adult programs through revision of the terms for Federal grant-in-aid, was rejected by the House in 1971 in favor of a more radically Federalized structure like FAP. The latter reflected a clear preference of House Ways and Means Chairman Wilbur Mills which was accepted by his committee and the full House with little debate or discussion.[39] The 1971 bill passed by the House contained in title III a new Federally funded and administered program to replace the Federal-state programs of Old Age Assistance, Aid to the Blind, and Aid to the Totally and Permanently Disabled.[40] Consistent with the 1971 bill's FAP provisions, states were permitted but neither required nor financially encouraged (beyond the "hold harmless" provision) to supplement. Federal administration of supplements was not only authorized but encouraged by two incentives. First, Federal administration was made a prerequisite to "hold harmless" coverage. Second, it was furnished without cost; a state administering its own supplement had to bear the full cost of administration. The Ways and Means Committee clearly favored "one-window" Federal administration. Its report on H.R. 1 stated:

> [I]t would appear generally desirable that [State] supplementation be provided through the same agencies which would be established to operate the Federal programs. This would avoid unnecessary duplication of administrative costs, would permit the States to take advantage of the improved methods and procedures which the bill would require, and would tend to foster national uniformity in the operation of assistance programs. Your committee's bill accordingly not only permits the States to enter into agreements with [HEW] which provide for Federal administration of State supplemental payments, but encourages such agreements by not requiring the States to make any contribution toward the administrative costs arising out of these agreements and by

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[38] *See R. Levy, T. Lewis, and P. Martin, Social Welfare and the Individual* 99–100 (1971).

[39] *M. Bowler, The Nixon Guaranteed Income Proposal* 94 (1974).

[40] The new program was at that point labelled simply "Assistance for the Aged, Blind, and Disabled." The name "Supplemental Security Income" was substituted in the Senate in 1972 at the suggestion of HEW Undersecretary John Veneman. *See V. Burke & V. Burke, Nixon's Good Deed: Welfare Reform* 197 (1974).

guaranteeing the States that agree to Federal Administration against increases in the cost of making supplemental payments.[41]

The report also justified tying "hold harmless" to acceptance of Federal administration on the ground that states needed protection in a situation in which they would be losing all administrative control over supplementary payments.[42]

It was not the Committee's intent, however, that the Federal agency agree to administer all forms of supplementation which, juding from past assistance patterns, states might wish to continue. "Special needs" grants furnished only to those in "unusual circumstances" were such a case as, for example, a special housekeeper allowance for "an aged, blind, or disabled person unable to provide housekeeping services for himself." The Committee's report took the position:

> [T]hat the responsibility of the Federal Government in administering a State program of supplemental payments should generally be limited to administration of a basic uniform payment which does not vary according to such "special need" and is the same throughout the State and that any additional "special need" payments should be generally made directly by the State. Thus, a State could also pay an additional amount on an individual case-by-case basis . . . . This additional payment would have no effect on either the amounts payable under the Federal program or the federally administered State uniform supplementation program.[43]

In neither the House nor later in the Senate did discussion focus on the type of arrangement contemplated by the bill's authorization, indeed encouragement, of agreements for Federal administration of state financed supplements. The administrative problems posed by such novel arrangements were almost totally ignored. The portions of the House Committee report referred to above furnished the most detailed indication of legislative intent concerning the agreements.

When, after House passage in 1971, H.R. 1 went to the Senate Finance Committee, it encountered drastically different views on the desirability of Federal administration. Senate Finance Committee Chairman Russell B. Long was, at best, skeptical. As a result, the Senate committee's hearings paid considerable attention to the basic question of whether a Federally administered cash payment should be substituted for Federally supported state programs. However, throughout that discussion, the subsidiary issues surrounded Federal administration of state supplements received only passing mention.

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[41] *H.R. Rep. No. 231, 92d Cong., 1st Sess.* 199 (1971).

[42] *Id.* at 201.

[43] *Id.* at 200.

Confronted with the testimony of numerous governors in favor of the provisions for Federal administration in H.R. 1, Senator Long repeatedly expressed his doubts. For example, in January 1972, Governor Smith of Texas told the Finance Committee he was "convinced . . . of the validity of a Federal takeover of the welfare program. . . . . [W]e need a new definition of responsibility between the States and Federal Government, with the Federal Government assuming complete and immediate responsibility for the operation and funding of the four public assistance categories . . . ." Title III drew his particularly strong support: "The establishment in H.R. 1 of a totally Federal program for the aged, blind, and disabled is one of the most far reaching and desirable features of the bill.[44]

Senator Long replied:

> [T]he more I think of it the more I believe it will be better to follow the type of approach we have in the unemployment insurance program where the Federal Government assumes the responsibility for raising the money but the State administrators continue to do the job, being appointed by the Governor but being subject to the regulations that the overall program requires.[45]

Altogether sixteen governors presented their views on H.R. 1 in person or by written statement to the Committee. Eleven of them supported the bill or its basic approach.[46] Several advocated the more generous version which had earlier been put forward by Senator Ribicoff. Most of these supporters dealt quite explicitly with the question of Federalization. Then Governor of Georgia, Jimmy Carter, said, for example, "I believe that the income maintenance programs should be federally funded and federally administered."[47]

The governors of California (Reagan), Oklahoma, Washington, and Wisconsin took negative positions on the bill, stressing the desirability of state welfare administration from several different perspectives.[48]

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[44] *Social Security Amendments of 1971: Hearings on H.R. 1 Before the Senate Comm. on Finance, 92d Cong., 1st and 2d Sess.* 1088–89 (1972).

[45] *Id.* at 1092–93.

[46] *See id.* at 943, 1027, 1043, 1088, 1101, 1999, 2002, 2144, 2799. Shortly after President Nixon's welfare reform address in August 1969, the National Governors Conference passed a resolution calling for:

> 1. Substitution, on a phased basis, of a federally financed system of welfare payments for the current federal-state programs for the aged, blind, disabled, and dependent children, and including also the general assistance programs now financed by the states themselves. Eligibility and grants would be determined by the federal government . . .
>
> 2. Transfer [of] the present Old Age Assistance, Aid to Permanently and Totally Disabled, and Aid to the Blind programs to the Social Security Program, with payments being made from federal general revenues to the Social Security Trust Fund to cover the increased cost.

Resolution on Welfare Reform adopted by National Governors' Conference at 61st Annual Meeting in Colorado Springs, Colo., Aug. 31-Sept. 3, 1969.

[47] *Social Security Amendments of 1971: Hearings on H.R. 1 Before the Senate Comm. on Finance,* 92d Cong., 1st and 2d Sess. 1999 (1972).

[48] *Id.* at 1873, 1939, 2802, 2803.

Finally, one governor, Meskill of Connecticut, took a position that foreshadowed the action Congress eventually took in 1972. He expressed a general preference for state administration, but said, he thought the adult categories were a special case:

> I strongly recommend the immediate assumption and administration by the Federal Government for the full costs of all categories of welfare which include old-age assistance, aid to the blind, and aid to the disabled . . . .
>
> These areas are so like [Social Security] that there really is very little reason why they could not and should not be administered from Washington. The blind are not going to get their sight back, the disabled are not going to become able bodied, and the old are not going to become young, and I feel it is in the other areas where supervision and administration can keep the numbers on the rolls down and can eliminate fraud and prevent overpayments and underpayments. This is the area where we should have the State and the local control.[49]

Senator Long picked up the idea:

> Governor, I find some appeal to your suggestion that the Federal Government should take over the adult categories. If I thought the Federal Government would administer it better than the States, I might vote to do just that.
>
> It occurs to me that we might have a try at the area that should be the easiest to administer—that is, the old age assistance area—by voting that the Federal Government should immediately take [it] over . . . . Would you think that most States would elect to let the Federal Government simply go ahead and take that program?[50]

Meskill replied: "I think they would . . . ."[51]

Only one state official, Governor Lucey of Wisconsin, focused particular attention on the administrative problems and possible intergovernmental friction which might arise out of Federal administration of state supplements. He told the committee:

> The administrative structure proposed in this bill creates problems rather than solves them. Although basic grants will be simplified, federal agencies will have to keep two separate records—one for determining federal benefits and another for those cases eligible for state supplements. However, this extensive bureaucracy does not relieve the state of the need for record keeping. States will want to review these records thoroughly to insure that they are not billed for cases that would be federally funded or for state supplements in excess of established benefits.

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[49] *Id.* at 2008.

[50] *Id.* at 2014.

[51] *Id.*

> Since administrative costs are relatively small in comparison to total assistance payments, most states will want to keep administrative control over their supplemental program to insure that the savings are realized. However, the bill is structured in such a way that states are in effect precluded from retaining administrative control of the supplements even though the state supplements may still approximate 50 percent of the total cost of benefits.[52]

In June 1972, following its hearing on H.R. 1, the Senate Finance Committee announced several tentative points of agreement including dropping the new Federal program for the aged, blind, and disabled contained in Title III in favor of minimum benefit standards for state assistance programs for the adult categories combined with a more generous Federal grant formula (essentially the approach contained in President Nixon's original plan).[53] But by the time the committee reported out a bill on September 26, 1972, it had reversed its position and the Federal program for the adult categories, now called Supplementary Security Income, was back in. A Senate staff member is quoted as saying:

> The Committee looked at the new program for aged and disabled adults early in the proceedings and they voted to change H.R. 1 so the adult programs would remain under state administration. This motion was advocated by the "states' rights types" on the Committee. It took a big lobbying job by HEW to get the federal program approved by the House back into the Committee's bill.[54]

When H.R. 1 came to the Senate floor, Senator Tunney of California offered an amendment to the Supplemental Security Income sections of the bill which would have required states to supplement the Federal SSI benefits up to the level paid under existing state adult programs so that "aged, blind, and disabled public assistance recipients in States such as California will not be worse off after the enactment of H.R. 1 than they are presently."[55] The amendment failed.

On October 17, 1972, H.R. 1 was enacted without FAP (which the Senate would not pass) but including the new SSI program.[56]

2. *The Pre-Implementation Amendments—Mandatory Supplements*

The relative inattention to SSI before H.R. 1's passage may explain, in part, why the program's legislation was amended three times in the following fourteen months between enactment and implementation on January 1,

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[52] *Id.* at 2804.

[53] *See M. Bowler, The Nixon Guaranteed Income Proposal* 136 (1974).

[54] *Id.* at 142.

[55] *See* 118 Cong. Rec. 33980–81 (1972).

[56] *See* notes 16 & 17 *supra*.

1974. On two of the three occasions (including Pub. L. 94-233, the Social Security Amendments of 1973, which was passed on December 31, 1973— *the day before SSI was to go into effect*) Congress adjusted the basic Federal benefit levels upward.[57] The relationship between SSI and Food Stamps also figured in two of the amendments.[58] But the most significant change occured in July 1973 (approximately six months before the program's inaugural date) when Pub. L. No. 93-66 imposed a supplementation requirement on the states similar to though not quite so extensive as the one which the Senate had defeated in October 1972. As a condition for continued eligibility for Federal grant-in-aid support of a state's Medicaid program that law required the payment of supplementary benefits to all SSI beneficiaries who had been recipients under the adult grant-in-aid programs in December 1973 to the extent necessary to assure that they would suffer no reduction in benefits due to the replacement of those programs by SSI.[59]

Like the basic SSI legislation, Pub. L. No. 93-66 broke new ground in Federal-state relations with little evidence that Congress was aware it was doing so.

The amendment was preceded by a one-day Senate Finance Committee hearing (June 19, 1973) consisting primarily of discussion between Chairman Russell Long and HEW Secretary Weinberger about the likelihood that states would permit their needy aged, blind, and disabled to suffer a benefit reduction when SSI began. The Senator's remarks indicate he thought widespread reduction possible and a serious problem.[60] Secretary Weinberger's testimony dealt with two proposals for dealing with that problem which committee staff had outlined in advance of the hearing—a one-year delay of SSI's start and a grandfathering of adult category recipients by the Federal government at December 1973 state benefit levels. He objected to both, the former on the ground that it would disrupt the very extensive conversion efforts of state and Federal agencies and the latter because of its large additional Federal expense and its administrative impact.[61] The Secretary noted, "there would be serious administrative implications arising out of the fact that for many years—as long as the 'grandfathered' people remain on the rolls—there would have to be case-by-case approach to maintain the payments that would take into account the multitude of special provisions in the States and local jurisdictions.''[62] Requiring states to grandfather with an option for Federal administration was an alternative which no one addressed at the hearing. Yet only ten days later the Senate Finance Committee proposed that solution—mandatory state supplementation *for one year*—as one of a series of Social Security Act amendments to a House passed debt limit bill (H.R. 8410) which was then before the Senate.[63] The Senate agreed to those amendments and others, but the House held fast.[64] None of the discussion in the House, however, dealt with the merits of mandating state supplementation; the dominant objection was to the Senate's attachment of diverse non-germane amendments to legislation which had to be passed by the end of June.[65] The day after House rejection (June 30), the Senate added mandatory supplementation to H.R. 7445, "An Act to Amend the Renegotiation Act for Two Years and for Other Purposes."[66] This bill had slightly less urgency surrounding it than the debt limit bill, although without its passage the Renegotiation Act expired that very day. The bill went to conference and came out—all on June 30.[67] For reasons never explained the conferees made the one-year mandatory supplement provision permanent.[68] This time the House agreed.

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[57] *See* Pub. L. No. 93–66, § 210, 87 Stat. 152 (1973); Pub. L. No. 93–233, § 4, 87 Stat. 947 (1973).

[58] *See* Publ. L. No. 93–86, § 3(b), 87 Stat. 221 (1973); Pub. L. No. 93–233, § 8, 87 Stat. 947 (1973).

[59] *See* Pub. L. No. 93–66, § 212, 87 Stat. 152 (1973).

[60] *See Supplemental Security Income Program: Hearing on the Need for Protecting Aged, Blind, and Disabled Welfare Recipients from Suffering a Reduction in Benefits When the New Federal Supplemental Security Income Program Becomes Effective in January 1974 Before Senate Comm. on Finance*, 93d Cong., 1st Sess. (1973).

[61] Said Weinberger:

> Any change in direction now or any uncertainty as to the commitment of the Federal Government to the program would disrupt the progress of the many Federal, State, and county officials who are deeply engaged in accomplishing the conversion. Even more important, any vacillation would, in our judgment as responsible administrators, seriously jeopardize the receipt of checks in January 1974 by some 6 million needy aged, blind, and disabled people.

Id. at 7.

Discussion on the floor of both Senate and House was minimal.[69] Neither the novelty of the requirement in terms of Federal-state relations nor the administrative difficulties it posed received mention.

C. *Summary*

In developing procedures for reaching agreement with states for Federal administration of both optional and mandatory supplementary benefits, HEW received little guidance from Congress, beyond the basic message that the process should encourage states to elect Federal administration. And in establishing procedures for dealing with post-agreement disputes concerning agreement terms, liability, and so forth, whether in the agreement itself or by regulation, the agency was similarly on its own. Any specific procedural requirements came not from the Social Security Act but from other more general legislation—as, for example, the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. The applicability of such other legislation to these unique arrangements (explored in Part 5 of this report) was, itself, unclear in large part because of their novelty.

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[62] *Id.* at 6.

[63] *See* 119 Cong. Rec. 21582-90 (1973). Actually the Committee's action was taken within two days of the hearing. A press release dated June 21, 1973 described the full set of committee amendments to H.R. 8410, including the mandatory supplementation provision.

[64] *See id.* at 21628, 22384-403.

[65] *See id.* at 22398-403.

[66] *See id.* at 22481-99.

[67] *See id.* at 22499, 22605, 22637.

[68] *See id.* at 22606.

[69] *See id.* at 22605-10, 22637-46.

PART 3. THE AGREEMENT FORMATION PROCESS—AS IT WORKED (1973-1977)

A. 1973—The Critical Start-Up Period

1. Early Involvement of State Officials

With the enactment of H.R. 1 in late 1972, HEW and the states faced the challenge of implementing SSI, including the novel provisions for Federal administration of state supplements, in little more than a year.

Low benefit states in which the Federal SSI benefit surpassed the level of assistance under the soon-to-be-replaced grant-in-aid programs for all or most recipients could reasonably expect to take a passive role. For them, January 1, 1974, appeared to mark the end of state responsibility for the "adult" segments of the welfare population.

In many states, however, the Federal benefits fell below the OAA, AB, or APTD grants paid a large number of recipients. In these states, supplementation was an important issue. At the time it seemed evident, particularly if the novel arrangement for Federal administration were to be used, that providing supplementation would, in most states, require new state legislation.[70] Consequently, it was critically important to resolve questions about state supplementation—including the principal requirements to be imposed as conditions for Federal administration—early enough in 1973 to permit state legislatures to act.

Fortunately, despite the uncertainties that had surrounded H.R. 1 generally and the form of its adult program provisions in particular, neither the Social Security Administration nor the states were caught totally unprepared by passage of the SSI legislation. Social Security Administration planning for eventual implementation of Federally administered assistance had begun as early as March 1971.[71] And shortly after House passage of H.R. 1, the agency took steps to involve state welfare officials in that planning process. Social Security Commissioner Ball outlined the need for joint planning at a meeting of the National Council of State Public Welfare Administrators (NCSPWA) in June 1971. The following day the Council established an eleven member Committee on Problems of Transition "to work with SSA and the FAP planning group in anticipation of the federalization of all public assistance categories." Subsequently the group met on a regular basis with Federal agency staff.[72] Less than a month after Pub. L. No. 92-603 was signed into law by the President, the Social Security Administration held a two day Supplemental Security Income Conference for state welfare officials in Baltimore. At that conference SSA's plans for implementation were outlined. Particular attention was given to contractual arrangements under which the states would perform essential conversion activity for the Federal agency. A draft "Agreement with State Agencies for Conversion," dated November 20, 1972, was circulated. (It provided full Federal reimbursement for specified activities necessary to transfer the existing adult caseload to the Federal agency. The latter required key information from state records on all persons carrying over to SSI assembled in a format compatible with the Federal agency's data system. The Social Security Administration had determined that establishing fresh records through applications by those millions of individuals was neither desirable nor feasible.)

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[70] A memorandum entitled "Guidelines for State Enabling Legislation" distributed by Irving Engelman, APWA-SSA Contract Administrator, as his first Information Bulletin to State Public Welfare Administrators on February 6, 1973, see note 73 *infra*, expressed the view that:

> Any State which plans to supplement the Federal benefits may now lack the legal authority to do so. It would appear likely that most, if not all, of such States will need enabling legislation in this area particularly because the State will need to be transmitting *State funds* to the Secretary for distribution as supplemental payments.

The memorandum went on to outline the principal elements to be included in such enabling legislation.

[71] *SSI Study Group, Report to the Commissioner of Social Security and the Secretary of Health, Education, and Welfare on the Supplemental Security Income Program* 13 (1976) [hereinafter cited as *SSI Study Group Report*].

[72] *Id.* at 15–16.

Also in late 1972 the agency entered into an agreement with the American Public Welfare Association (APWA), parent group for the National Council of State Public Welfare Administrators (NCSPWA), under which the Association contracted to perform a liaison function with the states during the start-up of SSI. Mr. Irving J. Engelman, Director of the Division of Public Welfare of the New Jersey Department of Institutions and Agencies, was selected to handle the contracted for liaison activities. He joined the APWA by January 1973 and served as director of the APWA-SSA contract through several extensions until it finally terminated September 30, 1977.[73]

In February 1973, the NCSPWA's Committee on Problems of Transition was revived and renamed, becoming the Committee on SSI Transition. Dr. R. Archie Ellis, Commissioner of South Carolina's Department of Social Services, was appointed chairman. The committee was assigned the related tasks of "working with SSA on the technical problem of transition of the adult assistance categories from state to federal administration, and . . . serving in an advisory capacity on the APWA-SSA contract." The group convened for the first time on April 15. The call for that meeting, a memorandum from Mr. Harold Hagen, Washington representative of the APWA (which at that point still had its principal office in Chicago),[74] informed the members: "Since Mr. Irving J. Engelman, in his capacity as the Director of the APWA-SSA contract, is directly involved in the matters of primary concern to this Committee, he has agreed to provide the staff services for the committee. In the future, therefore, communications and arrangements relating to the work of your committee will be handled by Mr. Engelman."

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[72] *Id.* at 15-16.

[73] Much of Mr. Engelman's liaison activity was furnished in the form of staff support and guidance for the NCSPWA committees whose work is discussed in this Part. Independent of the committees, however, he surveyed the states on matters of importance to SSA and communicated regularly with state administrators through a series of Information Bulletins. These Information Bulletins, consecutively numbered, began in February 1973 and continued at a rate of several per month right up to the end of the APWA-SSA contract in September 1977. When referred to in this report, they are cited by number and date, *e.g.*, Information Bulletin #1, February 6, 1973.

The SSI Transition Committee met twice more in 1973 (August and October) to review and respond to proposed SSI regulations published in the Federal Register—particularly those dealing with state supplementation.

A second NCSPWA SSI committee was appointed in 1973, the Special Committee on Contracts. Its task was to work out appropriate basic agreement terms with SSA in the several areas where the statute contemplated Federal-state agreements or contracts. Like the Transition Committee it was chaired by Commissioner Ellis of South Carolina and recieved staff support from Mr. Engelman. Including Chairman Ellis the Committee was comprised of five NCSPWA members augmented by four representatives from the American Association of Public Welfare Attorneys (another consistuent group of the APWA).

2. *HEW's Resolution of Two Questions Central to State Decisions About Supplementation*

Before state welfare officials and legislatures could make the most fundamental decisions about supplementation, they needed additional information in two areas on which the statute spoke with insufficient detail. As state legislatures met in 1973 and in some cases moved close to adjournment, legislation necessary to implement supplementation awaited resolution of questions in these areas.

Operation of the Hold Harmless Formula.—In place of the old matching formulae, the arrangement established by the SSI legislation had the Federal government covering a portion of some but not all states' supplementary benefit costs. (As the formula worked it offered nothing to prior low-benefit states.)[75] The Federal share was to be determined under a "hold harmless" provision of uncertain dimensions tied to the election of Federal administration. The balance of supplementary benefit expenditures had to be paid by the state without Federal contribution. For states to which the "hold harmless" protection might conceivably apply knowing precisely how it was to be calculated more critically on decisions about the general level of state supplementation, the contours of any payment level variations designed to reflect differences in need, and the basic issue of whether to elect Federal administration of all or some or none of the state benefits.

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[74] The APWA office moved to Washington, D.C. in January 1974.

[75] Pub. L. No. 92-603, § 401, 86 Stat. 1329 (1972), as amended by Pub. L. No. 93-233, § 18(h), 87 Stat. 947 (1973).

In a low-benefit state, the "difference between . . . the adjusted payment level under the appropriate approved plan of such State as in effect for January 1972. . . . , and . . . the benefits under Title XVI of the Social Security Act [SSI], plus [countable] income"—one limit on Federal "hold harmless"—would be zero or less. *Id.* § 401(a)(2).

The Degree of Flexibility To Be Allowed in Federally Administered Supplements.—Whether or not potentially subject to "hold harmless" Federal contributions, states contemplating supplementation needed to know what sorts of eligibility limits and payment variations HEW would accept in supplementation programs for which Federal administration was sought.[76] Compared to the pattern of the Federal SSI benefits, most state "adult" programs had high degree of variation in payment levels to reflect diverse recipient living situations. The issue for such a state was, in essense: Could a reasonable approximation of its old approach be carried forward as a Federally administered state supplement? States also wondered whether they could (again with Federal administration) supplement some SSI recipients (*e.g.*, those transferred from the prior programs or those with ineligible spouses in their household) but not others.[77]

By early March, 1973, SSA had identified those states most likely to be affected by the "hold harmless" provision should they elect Federal administration of their supplementary benefits. Those states were contacted and individual studies were begun by SSA to determine the consequences of alternative methods of determining the critical elements of the "hold harmless" formula, in particular the "adjusted payment level" for January 1972, the "non-Federal share of expenditures as aid or assistance . . . in . . . 1972," and the manner in which state supplements were to be held against those amounts. Information Bulletin #5 from Irving Engelman to State Public Welfare Administrators, dated March 6, 1973, directed states desiring an "official determination of [their] 'adjusted payment level' " that had not been contacted by SSA on or before March 15 to notify his office immediately. By mid-April SSA had visited 22 states and collected data bearing on the range of 1972 payment levels from 14 states plus the District of Columbia.

On April 15 at the first meeting of the APWA SSI Transition Committee SSA officials outlined the results of that study and expressed the hope that Federal answers to the various key questions would be available soon.[78]

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[76] Recall that the statute specifically instructed the Secretary to set, through the agreement, "such . . . rules with respect to eligibility for or amount of the supplementary payments, and such procedural or other general administrative provisions, as [he] finds necessary . . . to achieve efficient and effective administration of both the program which he conducts under this subchapter [SSI] and the optional State supplementation." 42 U.S.C. § 1382e(b)(2) (Supp. V 1975).

Mr. Sumner Whittier, Director of the Bureau of Supplemental Security Income (BSSI) responded to an expression of state concern about the urgent need for definite answers to permit state agencies to prepare recommendations for their legislatures, saying that Federal officials were as deeply concerned with the problem as the states. He asked for understanding of the difficulties faced by the Federal agency.

> . . . [H]e observed that although supplementation appears on the surface to be a relatively simple matter, it turned out to be a problem area involving extreme variations in data, making it difficult for the Secretary to arrive at valid decisions without sufficient information of a kind which was not immediately available anywhere. This information has now been obtained . . . and is presently being considered. A decision should be forthcoming with respect to basic supplementation policies within a week or so.

Mr. William Ferguson of BSSI, the project officer for the APWA contract, elaborated. He indicated that the data collected from the 14 states plus the District of Columbia showed that great disparities existed "among the states with respect to the relationship between their published payment standards and the actual level(s) of payments made." Special needs payments, differential payment levels for those living in special care facilities, and so forth produced large differences. He reported that "in recognition of these disparities, a paper identifying the effects of various optional approaches [had] been prepared for submission to the Secretary, with recommendations, for his final determination of what will be the ultimate official policies."

On April 26 Mr. Engelman communicated the following expectation to all state administrators:

> Within the next two weeks there will be announcement of decisions on various major policy issues that have been awaiting resolution . . . . We anticipate that such announcement will be in the form of *proposed* regulations, to be published in the Federal Register, with opportunity for official expression of views thereafter by all interested parties. We have every confidence that all such expressions which may be communicated to the Secretary in response to such publication will be seriously considered.[79]

He turned out to be wrong on both timing and procedure. A month later, May 25, in a letter to the fifty state governors, the Secretary of HEW set forth "finalized major policy decisions" on SSI supplementation.[80] Taken together those decisions provided much greater inducement for states to elect Federal administration than they had previously been given reason to expect.

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[78] A memorandum prepared by Engelman for use by members of the SSI Transition Committee and a summary of the meeting from which the account in the text is drawn were circulated with Information Bulletin #10, April 26, 1973.

[79] *Id.*

States for which "hold harmless" was a possibility were told that in calculating their "adjusted payment level" "the average of cash payments to individuals living alone with no other income within each category (aged, blind, and disabled) for basic needs, and some special needs, and at the state's option, for domiciliary care would be determined." They were also informed that if a state supplemented different groups of SSI recipients at different amounts, those it supplemented below the "adjusted payment level" could be used to offset others supplemented at a higher level.

All states were offered greater flexibility in shaping supplements which the Federal agency would administer than the statute, legislative history, and prior discussions with SSA staff might have led them to expect. Not only could they set different payment levels for the three distinct SSI categories (aged, blind, and disabled) but HEW would accept, in addition, two and, on special showing, three geographic variations and up to five different payment levels for different living arrangements.

Engelman pointed out to state administrators that in view of those decisions "undoubtedly certain states which heretofore had determined not to consider a plan for Federally-administered State supplementation may now find it advantageous to reconsider the question."[81]

The hour was late for such reconsideration, however; it was even late for states already planning to use Federal administration. According to HEW monitoring, this is how matters stood in June 1973, shortly following issuance of the "finalized decisions" on supplementation questions:

(a) Ten states had decided not to supplement since the Federal SSI benefits would, at least on average, exceed their prior payment levels;

(b) Officials in sixteen states had determined that existing law authorized the state welfare agency to pay supplementary benefits without further action by the legislature; and

(c) In twenty-four states and the District of Columbia enabling legislation was in some stage of consideration. (In all but four of those states the legislature was still in session, although in some cases not for long. In the other four a special session was necessary if the state was to supplement as of January 1, 1974).[82]

It was roughly at this point, of course, that Congress, concerned about the adequacy of state supplementation, passed Pub. L. No. 93-66, the mandatory supplement legislation, adding new complexity to the decision-making process, for both HEW and the states.

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[80] *See* Information Bulletin #12, June 8, 1973.

[81] *Id.*

[82] Letter from Frank C. Carlucci, Under Secretary of HEW, published in the *Washington Post,* June 20, 1973.

HEW's "finalized major policy decisions" remained final. They were incorporated in HEW's first "proposed" SSI regulations, which did not appear until August 6, 1973 (delayed, at least in part, by the confusion generated by the the mandatory supplement legislation).[83] They remained unmodified in the "final" regulations, which were not issued until over a year after the program was underway.[84]

3. *Circulation of "Model" Agreement Forms*

Before the major questions affecting state supplementation decisions had been resolved by HEW, a first draft of the terms and conditions on which the agency would agree to administer state supplements was released for state comment. The AWPA was used as the channel. Engelman's Information Bulletin #9 to state administrators (dated April 23, 1973), carried a copy of the draft and invited critical comments "either as to substance or form." It noted:

> This text is purely tentative. It has not yet been approved by the Office of General Counsel, nor of course by the Office of the Secretary. Therefore, it should not be regarded as expressive, directly or indirectly, of any official policy determinations.

The main body of the draft agreement avoided the hard questions of payment level variations and "hold harmless" calculation. Those provisions were to be contained in an Appendix A which the basic agreement terms incorporated by reference. Thus, Article IV, C provided that "the amount of supplementary payments [made by the Secretary] shall be determined in accordance with Article I of Appendix A of this agreement." And Article V, A provided that a state should advance funds for supplementary payments "until the amount specified in Article II of Appendix A [the hold harmless provision] is reached in any fiscal year." This early draft included an Appendix A with blanks for several payment levels and the terms of the "hold harmless" equation. Its framework, however, clearly contemplated fewer state payment level variations and a more rigid "hold harmless" approach than emerged from the HEW decision-making process a month-or-so later.

The draft agreement, which bore the legend "Revision 3-5-73" and comprised, without appendices, 7 typewritten pages, covered allocation of function payment procedures, basic liabilities of the parties (who would pay for what), duration of the agreement, and procedures for its termination or modification.

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[83] *See* Subpart T, 38 Fed. Reg. 21,189 (1973).

[84] Subpart T, 40 Fed. Reg. 7639 (1975).

Some of the these matters were ultimately to be addressed, at least partially, in HEW's SSI regulations (which as noted above were not issued in proposed form until August 1973) but many details of the agreement were not. The Federal agency appears to have taken the view that the full detail of the Federal-state agreement was not a proper subject for regulation, that technical, operational details, of this sort were best handled through the circulation for comment and subsequent revision of model agreement form(s). The states responded by creating a Committee on Contracts.

That early draft did, however, deal decisively with at least two matters of such importance to the states that they later became "policy questions" requiring high-level HEW attention. The first concerned HEW liability for erroneous payments—that is, payments to individuals who were ineligible or of amounts that were greater than they should have been.

As to this, the draft agreement provided in Article VIII:

> The Secretary shall not be liable for supplementary payments made on behalf of the State which are erroneously paid to any individual unless such erroneous payments are the direct consequence of gross negligence or fraud in the administration of such supplementary payment program. The Secretary shall, nevertheless, undertake recovery, adjustment or recoupment of any such overpayments pursuant to regulations and policies adopted by the Secretary with respect to overpayments of basic federal payments.

The second matter was the timing of state transfers of funds to the federal agency. Article VI of the draft agreement called for "the State [to] make a monthly *advance* of funds to the Secretary which is sufficient for his use in paying the [specified] supplementary payments" (emphasis added).

Other "contractual" details, although less troublesome than those two, also proved difficult to resolve as the Federal agency and the states "negotiated" the terms of the "model agreements" which were to form the basis for Federal-state arrangements under SSI.

4. *"Negotiations"*

The review of subsequent model agreement drafts and "negotiations" with SSA over their terms were handled by the NCSPWA Special Committee on Contracts. The addition of mandatory supplementation by Pub. L. No. 93-66 in July 1973 necessarily increased the number of agreement forms and delayed the process. That act not only necessitated a new agreement with terms appropriate to Federal administration of the mandated supplementary benefits for states electing not to administer themselves, but its terms required *all* states subject to the supplementation mandate to "agree" to supplement. Consequently, the Act gave even those states with no interest in Federal administration a stake in the negotiations of at least one agreement form.

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By the end of July 1973 the Special Committee on Contracts had received a full package of four new proposed "model" agreements. These were "drafts . . . developed by BSSI (Bureau of Supplemental Security Income) . . . not yet . . . cleared by the Office of the General Counsel." They included #1 (agreement for mandatory supplemental benefits—state administered), #2 (agreement for mandatory supplemental benefits—federally administered), #3 (agreement for mandatory and optional supplemental benefits—federally administered) and #4 (agreement for federal administration of Medicaid eligibility determinations).[85] At the committee's request Engelman distributed a questionnaire to state administrators which among other things asked for their evaluation of the agreement terms for Federal administration (of both supplemental benefits and Medicaid eligibility determinations.) By September 5 he had received 26 responses which he distributed to the committee.

In early October, the Special Committee on Contracts met with Social Security Administration representatives to go over the draft agreements. (This was over a month after the Transition Committee had gone over the first regulations on state supplementation with SSA). At that meeting "the understanding . . . was reached" that the Model Mandatory Minimum State Supplementation Agreement (Agreement #1) should receive first priority. On October 16, members of the Special Committee on Contracts were sent a copy of a revised draft of that agreement, prepared by SSA, which with a few exceptions "incorporated almost all of the editorial and substantive changes which the Committee requested."

By November 7, the Committee was prepared to endorse a version of that agreement which was distributed with Engelman's Information Bulletin #24 of that date. The Bulletin stated that the Committee approved the text in principle; that the text had not yet "been officially approved on behalf of the Social Security Administration"; but that the Committee thought it "likely to be so approved, either exactly as in the attachment or substantially so;" and that, therefore, it recommended that all states execute an agreement if offered on such terms "without waiting for further advice from the Committee as regards such contract." The bulletin also promised additional advice from the Committee concerning the other three agreement forms "in a day or two."

"A day or two" turned out to be three weeks. Furthermore, the mandatory supplementation agreement underwent other changes. Information Bulletin #25, dated November 28, superseded #24. It reported that "continuing discussions between the NCSPWA's Special Committee on Contracts and representatives of the Social Security Administration [had] resulted in the development of a final model for the Mandatory Minimum State Supplementation Agreement (. . . #1).'' The Committee endorsed the form: ''The Committee affirmatively recommends that every State proceed forthwith to execute a basic agreement in this form, since it may appropriately be executed even by States which will be contracting, in separate agreements, for Federal administration of mandatory and optional supplementation or both.'' Bulletin #26, which followed the next day, informed stated administrators of ''the final results of the continuing negotiations in which the NCSPWA's Special Committee on Contracts had been engaged, with representatives of the Social Security Administration, concerning mutually acceptable contract models,'' and noted one provision in earlier drafts which had been deleted by ''the Commissioner'' in response to the ''Association's insistent request.''

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[85] Despite other changes, that numbering system struck. Subsequent references to Agreement #1 and so on in this report are consistent with these subject matter identifications.

In 1973, almost from the start, the successive HEW drafts of general terms and conditions for the Federal-state agreements bore the label ''model agreements.'' As the phrase suggested it was not then clear how much uniformity the Social Security Administration would or could insist on in its agreements with the states. The establishment of a contract committee by the states and the evolution of a collective bargaining relationship with that committee were developments not foreseen by the Federal agency. Through that process, the ''model agreements'' became more than mere models to be used by HEW in state-by-state negotiation. Ultimately they became mandatory terms and conditions or the near equivalent. To this day, though, the standard terms and conditions for SSI Federal-state agreements are called the ''model agreements.''

5. *HEW's SSI Regulations*

The tentative regulations on optional state supplementation issued on August 6, 1973[86] (which were followed by those on mandatory supplementation appearing on October 3)[87] dealt with a number of areas which concerned state administrators who had received the initial draft agreements and the May 25 Secretarial letter laying down supplementation guidelines. To begin, they elaborated on the ''hold harmless'' calculation, without, however, answering all the questions states were raising about it. They also responded, at least partially, to state unhappiness with the lack of accountability reflected in the earliest agreement forms. Section 416.2005(c) of the proposed regulations provided:

> Any state entering into an agreement with the Secretary which provides for Federal administration of the State's supplementary payments may audit the payments made by the Secretary on behalf of such

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[86] Subpart T, 38 Fed. Reg. 21, 189 (1973).

[87] § § 416.2070–416.2082, 38 Fed. Reg. 27,412 (1973).

> State. State audit of supplementary payments made by the Secretary, in accordance with the agreement, is limited to no more than one such audit in each fiscal year provided in the agreement, and shall be made at State expense. Resolution of the audit findings shall be made in accordance with the provisions of the State's agreement with the Secretary. In addition, the State and the Secretary may further agree to provide for interim quality assurance procedures compatible with efficient administration where justified by circumstances.

The original draft agreement contained nothing comparable. It simply stated at one point that the Federal agency would "receive, disburse and account to the State for State funds in making such supplementary payments and furnish the State periodic fiscal reports thereon." At another point the agreement provided that: "The Secretary, as soon as possible, after the expiration of each fiscal year, shall submit to the State a report, including supporting data, of the total supplementary payments made by the Secretary on behalf of the State and the State's total liability therefor." The states consistently maintained that they were entitled to greater accountability for the disbursement of their funds by the Social Security Administration, indeed that their state laws required it.

But even in responding to this state concern the August 6 HEW regulations left many important issues to be resolved in the framing of the ultimate agreement terms. As in the portion quoted above numerous matters touched on by the regulations were to be resolved "in accordance with the agreement." As to other critical matters, such as federal liability for erroneous payments and procedures to be employed in resolving disputes arising under the agreement the regulations were silent.

All subsequent Federal-state discussion over the framework and terms for state supplementation concerned the several model agreements circulating in 1973 and the specific versions of those models being offered each individual state. Additions to or amendments of the regulations were not used in 1973 as a procedure for dealing with these issues. The states both individually and collectively, through the SSI Transition Committee, did comment on the August 6 and later regulations but no revised regulations appeared. In January 1974 (after the first Federal-state agreements had been signed and the program was operational) the Social Security Administration announced in the *Federal Register* that it would use the proposed SSI regulations previously issued, including those pertaining to state supplementary benefits, to administer the program "until final regulations are adopted."[88] The regulations on state supplementation did not appear in final form until February 1975[89]—long after not only the first version of the agreements, but also the second had been worked out between SSA and the states.

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[88] 39 Fed. Reg. 3674 (1974).

[89] Subpart T, 40 Fed. Reg. 7639 (1975).

A few of the provisions contained in the first or second round agreements were somewhat at odds with the original regulations. These discrepancies were not resolved until the proposed regulations were supplanted by slightly revised final regulations in 1975.

6. *What the "Negotiations" Achieved*

With perhaps one exception all changes of substance in the agreement terms from the SSA draft of April 1973 to the final versions of the model agreements mutually approved by the NCSPWA Contract Committee and the Social Security Administration were made in response to State concerns. That exception was a provision expressly exempting Federal termination of the agreement because of state noncompliance from the 120 day written notice requirement that applied to terminations generally. Responding to state concerns were provisions which: (1) spelled out the state's audit and quality assurance rights mentioned in the August 6 proposed regulations; (2) recognized federal liability for erroneous payments and set up a formula for its determination; (3) assured states of a month-by-month adjustment of their payment obligation to reflect the cumulative experience during the year; (4) spelled out a procedure for resolving liability and other agreement disputes which offered greater assurance of impartiality.

In addition, the final agreement forms omitted a clause which had greatly disturbed the states. That clause had said, quite simply:

> *Compliance With Regulations and General Instructions*
>
> The State shall comply with such Regulations and General Instructions as the Secretary may from time-to-time prescribe for the administration of this agreement. Nothing in this agreement shall be construed to limit, inhibit or otherwise control or affect the Secretary's authority to make regulations and issue general instructions respecting the Act and for the administration of the programs established pursuant thereto.

To the states it appeared to grant the Federal agency the unilateral power to amend the agreement. In late November 1973, the Commissioner of SSA approved deletion of that article from the model agreements.

A final issue for the states, addressed partially by changes in the model agreement and in a few instances by authorized individual state variations from the model, had to do with the timing of state payments to the Federal agency. The original draft agreement had said merely: "The state shall make a monthly advance of funds to the Secretary which is sufficient for his use in paying the supplementary [benefits]." The August 6 proposed regulations were more explicit: "In order for the Secretary to make State supplementary payments as provided by the agreement, the necessary amount of

State funds must be on deposit with the Secretary *prior to the month for which the supplementary payments are to be made on behalf of such state.*" (Emphasis added).[90]

At an August meeting of the SSI Transition Committee at which not only that provision of the regulations but also a set of "proposed guidelines" on "advance and adjustment of state money" provoked discussion of the issue, several state representatives expressed the view that it might be impracticable to get payments out in response to Federal statements of the amount required in as little time as the guidelines allowed (7 days) and illegal, under the fiscal and budgetary controls of some states, to pay in advance, particularly when that involved crossing fiscal or legislative years.

While the final model agreement contained the same language as the first version—"monthly advance of funds to the Secretary"—deviations from that language were permitted in the case of states for which it posed legal difficulty. The Iowa agreement, for example, read: "The state shall make a monthly payment to the Secretary on or before the date payment is to be received by the recipient." Moreover, the model agreement not only failed to pick up the tentative regulation's clear indication that state failure to make timely advance payment would cause supplements immediately to be withheld from recipients, but suggested the contrary in a revised termination clause:

> Nothing in this agreement shall be construed to preclude the Secretary from terminating this agreement in less than 120 days if the State fails to comply with the terms of paragraphs A, B, C, and H of Article III of this agreement (which shall include the failure of the State to make payments in a timely manner under Article VI) and fails to cure such noncompliance, or request an initial determination under [the disputes clause] of this agreement, within a period of 30 days (or such longer period as the Secretary may allow) after provision by the Secretary of notice explaining the grounds of the proposed termination.

All these areas of state concern over the early model agreement terms (augmented by the August 6 tentative regulations) were raised by the SSI Transition Committee in discussion with SSA representatives at a meeting held on August 24, 1973.

At that time the states faced a deadline of September 14 for execution of the agreements (in their then current version). In the face of state unwillingness to sign agreements before the regulations on mandatory supplementation were issued (which did not occur finally until October 3) and Federal concern that states desiring Federal administration not be lost which led to a willingness to consider state dissatisfaction with the agreement terms, that deadline (itself an adjustment of an earlier August deadline) was pushed back. Ultimately, December 1 set the limit. Negotiations between the NCSPWA contract committee and SSA continued right up to the wire. SSA distributed a revised set of model agreements to its regional offices for discussions with individual states in mid-November but they lacked the approval of the NCSPWA committee. Further negotiations produced agreement on both sides by November 27. SSA promptly sent out a list of the required changes in each of the model agreements dated 11/15/73. Some states had already signed agreements. They were "afforded the opportunity of replacing an already executed contract with a new one corresponding to the final model."[91]

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[90] § 416.2005(a), 38 Fed. Reg. 21,189(1973).

Virtually all the matters of general state concern raised at the August SSI Transition Committee meeting led to some change in the final agreement forms. Indeed, the two major issues had already (in August) been identified by SSA for possible accommodation. At that meeting, David Tomlinson, a BSSI representative reported:

> We have recognized most of the things you are saying here: (1) timing of money exchange; (2) question of fiscal accountability for "erroneous" payments. Both issues are having material prepared now. We are concerned since we are custodians of your funds, and there should be some kind of accountability. That is being developed-explored-and within a very short time we should have a definite response on that.

SSA intended the model forms to eliminate the need for a great deal of individualized negotiation, state to state. There were, of course, issues on which such negotiations were inescapable. The "hold harmless" formula, incorporating as it did, historic data derived from very different state benefit plans meant not only that agreement on a particular state's adjusted payment level(s) required individual negotiation and settlement, but even that issues of interpretation arising out of the federal formula promulgated in May and elaborated in the August tentative regulations concerning but a single state or two might arise. The New York representative at the August SSI Transition Committee meeting was quite concerned about two "adjusted payment level questions" on which SSA's position was unclear. But such matters were never resolved in the general negotiations since most states were unaffected.

SSA also contemplated minor variations from the model. Individual states could, and a few did, negotiate changes that clarified intent or made reasonable accomodation of strong state requirements (*e.g.,* fiscal procedures).

7. *The Disputes Procedure*

The regulations issued in August and October 1973 showed little recognition of the need for some procedural mechanism to resolve Federal-state disputes arising under the agreements. The only explicit reference to a situation of disagreement left its resolution to the terms of the agreement: "Resolution of audit findings shall be made in accordance with the provisions of the State's agreement with the Secretary."[92]

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[91] *See* Information Bulletin #26, November 29, 1973.

However, the early model agreement draft contained a "disputes" paragraph in Article V, "Advance of Funds and Final Settlements." It expressly applied to disputes over application of the "hold harmless" formula and seemed intended as well to apply generally to disputes over the amount of a State's reimbursement liability for a year's supplementary payments. The paragraph provided for a determination on such disputed matters by the Secretary. It gave the state a right to appeal that determination, leading to a new decision by the Secretary (acting through a different representative than made the initial determination). Such appeals had to be filed within 30 days after notice of the initial determination and the paragraph provided the state "an opportunity to be heard and to offer evidence in support of its appeal." While its scope was narrower than the standard disputes clause contained in Federal procurement contracts (which purports to apply to "any dispute concerning a question of fact arising under this contract"),[93] the "disputes" paragraph of the model agreement otherwise tracked its language closely.[94]

By June the revised model contract forms contained a new sentence providing that: "The final decision on appeal on behalf of the Secretary shall be made by the Armed Services Board of Contract Appeals in accordance with the provisions of 41 C.F.R. 3-1.318-51." (That section designates "the ASBCA to hear, consider, and determine fully and finally appeals by contractors from decisions of [HEW] contracting officers or their authorized representatives pursuant to [the standard procurement contract disputes clause]").

In early November that sentence was removed from revised model agreements. Further negotiations between SSA personnel and the NCSPWA Contracts Committee produced a new disputes clause which was circulated, with the Committee's approval on November 28, 1973.[95] The clause remained in the same article ("State Funding and Final Settlements"), immediately following the paragraph dealing with "negotiations on a final determination of state liability for supplementary payments and mandatory minimum supplements paid on behalf of the state . . . after audit." In full the revised paragraph, provided:

> E. If the Secretary and the State are unable to agree upon any

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[92] § 416.2005(c), 38 Fed. Reg. 21,189 (1973).

[93] As discussed in Part 5, *see* p. 169 *infra,* the standard disputes clause used in Federal government contracts hasn't quite the scope its language would suggest.

[94] *See* Federal Procurement Regulations, 41 C.F.R. § 1-7.102-12 (1977).

[95] *See* Information Bulletin #26, November 29, 1973.

> item in dispute, an official designated by the Secretary shall make an initial determination and inform the State, in writing, of his determination with a full explanation thereof. The Secretary shall review the initial determination if a written request is filed with him by the State within 90 days after notification to the State of such determination. On the basis of the evidence obtained by or submitted to the Secretary, he shall render a final decision affirming, modifying, or reversing such initial determination. In notifying the State of his decision, the Secretary shall state the basis thereof. In connection with the Secretary's review, the State shall be afforded an opportunity to be heard and to offer evidence in support of its position. Pending the final decision of the Secretary, the State and the Secretary shall proceed diligently with the performance of this agreement. The final decision of the Secretary upon such review shall be conclusive as to any question of fact in connection with his final decision, unless a court of competent jurisdiction finds such decision not to have been supported by substantial evidence. The previous provisions of this paragraph do not preclude consideration by the Secretary of any question of law in connection with decisions provided therein, except that nothing in this agreement shall be construed as making final such decisions on a question of law. The delegate of the Secretary who makes the final decision shall not be the same delegate who made the initial determination on behalf of the Secretary.
>
> The official designated by the Secretary to make the initial determination will be empowered by the Secretary to make his decision based on his own judgment of the facts and the law, and this decision will be final unless appealed by the State within 90 days as provided above.
>
> The delegate who makes the final decision on appeal for the Secretary will be empowered by the Secretary to hear, consider and determine fully and finally any such appeal by the State under the provisions of this paragraph.

In addition to having a clearer and arguably broader scope (''disputes'' subject to the paragraph) the new paragraph provided: a longer period for state decisions on whether to appeal (90 days instead of 30 days), a commitment on the part of the Federal agency matching the state's ''to proceed diligently with the performance of [the] agreement'' pending an appeal, and language stressing the independence of those officials designated by the Secretary to make both the initial decision and a subsequent decision upon appeal. The finality language was also changed to stress its limitation to questions ''of fact.'' References to judicial reversal of ''fraudulent,'' ''capricious'' and ''arbitrary'' decisions, as well as those ''so grossly erroneous as necessarily to imply bad faith'' were removed leaving a lack of ''substantial evidence'' as the only agreed-upon limitation on the finality of factual determinations.

8. *The Influence of Federal-State Conflict Over Other Programs*

Relations between SSA and the states during 1973 cannot be completely understood without an awareness of concurrent developments in the relationship between state welfare departments and HEW's Social and Rehabilitation Service (SRS) which then administered the Social Security Act grant-in-aid programs, including those about to be replaced by SSI.

To begin, there was built-in tension between the conversion effort and normal attention to ongoing administration of the adult programs. To "facilitate the Social Security Administration conversion and enumeration effort and normal attention to ongoing administration of the adult programs. To "facilitate the Social Security Administration conversion and enumeration effort" SRS allowed states to exclude the adult category programs from both the agency's stringent "quality control regulations" and normal requirements of periodic redeterminations of eligibility. On the other hand, to the distress of SSA, SRS repealed regulations which had allowed simplified methods of determining eligibility and required that states return to a more demanding verification of all eligibility factors. A January 1973 SSA report noted: "Reverting to more complete verification will increase the manpower needs of the States. While the cases should be more thoroughly investigated when received by the Social Security Administration in the conversion, the drain on State/local manpower required to accomplish this will have an adverse effect upon the SSA's requirement to involve these same employees in enumeration and conversion. This may create serious problems in some States."[96]

Of greater importance from the standpoint of the states were tensions created by SRS efforts beginning in late 1972 which sought to induce improvement in state administration of the grant-in-aid programs. The agency also took a very rigid attitude on reimbursing states for social services expenditures then in dispute. Altogether 1973 was, because of these developments, a year with an unusually high level of conflict between HEW and state welfare agencies.

The steps taken by SRS to control state payment errors began with a regulation which purported to allow States zero tolerance for errors in public assistance eligibility or benefit determinations. That regulation was withdrawn because of strenuous state protest, but was replaced by a regulation which set tight tolerance limits with fiscal sanctions (Federal reimbursement reductions) for a state's failure to meet them. These unpopular new measures figured quite explicitly in some of the dealings between SSA and state administrators. The later were inclined to point out the role reversal in the new arrangements for Federal administration of state supplemental benefits, suggesting that similarly strict controls on the quality of Federal administration (coupled with fiscal sanctions) were called for.

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[96] *See SSI Study Group Report* 17.

Comments prepared by the NCSPWA Committee on SSI Transition on Subparts T and U of the SSI regulations (those dealing with state supplementation and Federal determination of Medicaid eligibility) submitted in a letter from NCSPWA Chairman Wilbur J. Schmidt to Acting Social Security Commissioner Arthur E. Hess, dated August 31, 1973, expressed that general point:

> In various respects the obligations and other attributes of Federal (HEW)/State relationships will, in the SSA sector, be the reverse of those that exist in the SRS sector. This observation embraces such operations as fund advances, required periodic reporting, fiscal and operations audits, fiscal and operations accountability, quality control, and ultimate liabilities for error. It is the position of the States that the Secretary should, both in official regulations and in the actual implementation thereof, establish complete mutuality and reciprocity. The Secretary's proposed regulations governing the SSI program, as compared with the Secretary's existent and proposed regulations governing the various SRS programs, do violence to this principle.

In October Mr. Engelman was asked by SSA to obtain state reaction to a proposed agreement provision covering federal liability for errors. Engelman's memorandum dated October 18 describing the unanimous negative reaction offered two reasons for the states' response:

> 1. [T]he Secretary's liability with respect to errors in his disbursement of State funds (under SSI) should be no less in kind or degree than the liability he unilaterally imposes on the States for their errors in the disbursement of Federal funds (under SRS);
> 2. [T]his reciprocity should apply in the year 1974 as well as any other year; . . . if the Secretary wishes 1974 to be a year of sanction-free experimentation and evaluation (and all [state] respondents characterized such a wish as reasonable and understandable), he should apply this principle to *both* of his operating agencies, SRS as well as SSA.[97]

Finally, SSA minutes of an early 1974 session between Federal representatives and the NCSPWA Special Committee on Contracts note at one point: "Many times during our conversations their [the Committee's] efforts were to have a mutual treatment between the SRS program and ours."

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[97] In retrospect the second point seems especially significant. The states were, in 1973 at least, more interested in having penalties for erroneous welfare payments removed from the grant-in-aid programs than seeing them imposed on SSA in connection with its administration of state SSI supplementation.

B. 1974—Revised Agreements

1. Renewed Negotiations

Time had been a critical factor in 1973. The agreement forms were approved with a mutual understanding that something had to be in place by the end of the year and that both parties would cooperate in working out the bugs (administrative and contractual) which would, no doubt, appear. The first set of agreements ran only to the end of the 1974 fiscal year, June 30, 1974. They contained a provision whereby failure to terminate led to automatic renewal for another full year, but the states contemplated some improvement in the agreements by then.

The National Conference of the American Association of Public Welfare Attorneys meeting in December 1973 passed a resolution offering continuing assistance to the NCSPWA's committee "to draft state model contracts" for the period beginning July 1974. And a memorandum from Mr. Engelman to the Special Committee on Contracts dated January 29, 1974 presented a lengthy list of points of concern to the states which had not been pressed in the rush to produce agreements to cover the first six months of 1974. The committee prepared a proposed redraft of the agreement for Federal administration of supplemental benefits (#2). What followed is summarized in a memorandum to the NCSPWA from R. Archie Ellis, Chairman of the Special Committee on Contracts:

> On February 5 the Committee met with representatives of the Bureau of Supplemental Security Income, and presented and interpreted to them a proposed revision of Contract #2, embodying changes which, if accepted, would be reflected in all other contracts. The SSI representatives agreed that their goal would be to secure approval of the draft, or the development of a counter-proposal, for transmission to the members of the Committee not later than February 19.
>
> It was agreed that the conferees would thereafter meet again on Monday, February 25, for the purpose of seeking final agreement on a revised set of models to be reported to the Council at its meeting today. It was stipulated by your Committee that, if revised models could not for whatever reason, be finally agreed upon by this date, the Committee would recommend that every State promptly notify SSA in writing of its intention to terminate all existing contracts at their expiration June 30, 1974 so as to avoid automatic renewal for another year.
>
> The Committee and the SSI conferees met again on February 25 as scheduled. The Bureau of SSI had completed its work with respect to the Committee's draft (reflecting acceptance of most of the Committee's requests) by February 19; however, the Bureau had become unable to make an official response to the Committee on that date or by this time because of the introduction of new and different proposals at

> other echelons of the Department. The resulting issues in dispute are now on the desk of Commissioner Cardwell for decision.
>
> An official response to the Committee will be transmitted as soon as possible, and it was agreed that there will be a further meeting of the parties to be scheduled one week from the date of such transmittal. Meanwhile, we are assured that SSA will *not* treat existing contracts #1, #2, or #3 as being automatically renewed. The period of renegotiation of new contracts will be extended to the end of May, if necessary. A letter to such effect will be sent to all States.

It was not until April 24 that SSA's counterproposals, redrafts of Model Agreements #1, #2, and #3 were delivered to the Committee. Discussions with the Social Security Administration ensued.

Information Bulletin #57 to state welfare administrators, dated May 17, 1974, finally reported the successful completion of negotiations between the Special Committee on Contracts and the Social Security Administration. The Committee "affirmatively [recommended] that all States accept the model contracts" identified as "Revision May 16, 1974." Drafts bearing the date "3/12/74 or any other date earlier than May 16, 1974" were said to be "not acceptable." With a few exceptions which the committee was willing to accept, the May 16 versions were said to reflect "acceptance and incorporation of all changes which were requested by the Contracts Committee at the conclusion of the final negotiating session on May 9."

2. *The Revised Terms*

a. State Requested Changes

At the first meeting between the APWA Contract Committee and SSA officials concerning 1974 contract revision, on February 5, 1974, the Committee presented a draft agreement incorporating their proposed changes. An internal memorandum prepared by James Vidmar reporting on that meeting to BSSI director, Sumner Whittier, summarized the major issues requiring negotiation as follows:

> [Article I–] The Contract Committee has asked that all references in the contract to "general instructions and policies" be deleted. They prefer that promulgated regulations govern.
>
> [Article II–] The Contract Committee requests that costs of any studies which the Secretary conducts on the State's behalf which are in the interest of effective and efficient administration of the SSI program be borne by the Secretary.
>
> [Article V–] Somewhat facetiously the Committee is requesting that we have legally designated representative payees as they are attempting to force SRS to allow them to emulate SSA's current practice of allowing any interested persons to serve as a representative payee.

> Many times during our conversations their efforts were to have a mutual treatment between the SRS program and ours.
>
> [Article VI–] The Committee urged that we delete reference to advance payments. They pointed out that the Act itself does not call for an advance payment and they suggested their contract proposal specifically tracks section 1616 of the statute. Additionally, the Committee asked that the disputes clause be completely revamped to place the State in the role of contract officer and review officer rather than the Secretary, as is now the case.
>
> [Article IV–] Mr. Tomlinson [of SSA], in reviewing [the audit article proposed by the states], submitted for the Committee's consideration the possibility that one audit firm, whether it be government or private, be allowed to represent the 31 States currently having Federal administration; the group was quite sympathetic with the request, and will discuss it at a later time. The Committee seems satisfied that the States would build on to our quality assurance program but would request that SRS act similarly in their programs.
>
> [Article IX–] The Committee asked that State liability for furnishing erroneous conversion data will be limited up to the time of the first redetermination.
>
> [Articles X and XI–] In both [the renewal and termination] articles the Committee asked for a 60-day period rather than the 120 days in the contract.
>
> [Article XII–] The Committee has asked that the State have the same examination of records rights as the Secretary now enjoys in the current contract. [Article XII].
>
> [Certification–] The Committee suggests that the attorney general "or any other attesting official" have the authority to sign the certification.

(The article numbers preceding each item refer to the relevant article or articles in the final 1973 version of Agreement #3. *See* Appendix C.) In addition to those enumerated points, the Contract Committee draft repeatedly added language requiring the Federal agency to take various actions "promptly."

The agreement forms ultimately approved by the APWA Committee and SSA contained in complete or modified form a large number of these state-proposed revisions. The degree of the Committee's success during the 1974 negotiations is best seen by simply going down the items listed in the BSSI memorandum, quoted above.

References to general instructions and policies.—The 1973 agreements' definition for "eligible individual" and "December 1973 income" stated that the phrases would have "the same meaning as they have when used in [the relevant sections of the Act, as amended] and in regulations and policies prescribed thereunder by the Secretary." The 1974 forms eliminated "and policies." They also deleted the issuance of "general instructions for the administration of the supplementary payment program" from the enumeration of "Functions to be Performed by the Secretary" in Article II and the accompanying definition of "General Instructions" in Article I. The 1974 Article I defined only "regulations."

> K. The term "regulations" means those regulations promulgated by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 551 et seq.

The Contract Committee's draft had included an additional sentence in that section reading: "If any such regulation is promulgated subsequent to the date that this Agreement is signed by the State, and the State does not wish to comply therewith, the State may terminate this Agreement." Its concern was reflected in the negotiated form, by new language in Article III ("Functions to be Performed by the State"). The new section H provided that:

> The State shall . . . comply with regulations promulgated by the Secretary. If any such regulation is promulgated subsequent to the date that this agreement is signed by the State, and the State does not wish to comply therewith, the State may terminate this agreement upon 45 days written notice to the Secretary which must be given within 30 days of the effective date of such regulation. The State shall, however, comply with any such regulation promulgated subsequent to the date that this agreement is signed until the effective date of such termination.

As noted earlier, state concern over a provision which, without qualification, required compliance with all HEW regulations had led to its removal from the 1973 agreement forms. Thus, the new 1974 provision represented the return of an express statement of that obligation combined with a termination right to protect the states against unilateral SSA amendment of the agreement by regulation.

Studies.—The new agreement gave the states the right to request studies and evaluations. SSA would perform requested studies at state expense so long as they were both "reasonably requested" and "feasible." Such state-funded studies did not have to be found to be "in the interest of effective and efficient administration of the supplemental security income program" as the 1973 terms seemed to require. Under the 1974 provision a state requested study meeting that test would be carried out at Federal expense.

Representative Payee.—As suggested by Vidmar's memorandum the principal point of the states' proposal was to secure changes in the representative payee requirements for AFDC. However, the 1974 model agreements finally negotiated did include more detailed treatment of the issue.

The Timing of State Payments and the Disputes Clause.—The 1974 agreements no longer referred to the state payment as an "advance of funds to the Secretary . . . sufficient for his use'' in making payments. The new language in Article VI read:

> [T]he State shall pay monthly to the Secretary, on or before the date payment is to be received in the month by recipients, or 5 days after delivery to the State, of the SDX [State Data Exchange] payment data file issued in conjunction with the monthly SSI Treasury tape, whichever is later, an amount equal to the expenditures made by the Secretary for the supplementary payments . . . for that month . . . .

The changes in the disputes clause are discussed in detail in Part 4 of this report. They did not incorporate the Contract Committee's suggestion that initial determinations and appeals be decided by the state rather than the Federal agency.

Audit and Quality Assurance.—No changes of substance were negotiated.

State Liability for Erroneous Conversion Data.—The states' proposal was accepted. The new Article IX provided:

> [T]he State shall be liable for any erroneous mandatory minimum supplement or supplementary payment *which occurs between the time of the State furnishing the erroneous data and the first redermination by the Secretary.*

Notice Period for Termination.—The 1974 forms, reflecting a compromise between the original agreements' 120 days and the states' request for 60, specified 90 days.

Examination of Records.—While not granting states rights to examine Federal records equivalent to those enjoyed by the Federal government, the new article more narrowly circumscribed those rights reserved by the Federal government, limiting access and examination to that done ''for purposes of verifying: Administrative costs paid by the Secretary to the State, the amount of Adjusted Payments levels, calendar year 1972 non-Federal expenditures, and establishment or recalculations of Minimum Income Levels and countable income.''

Certification.—The new form permitted certification by the State Attorney General or the ''legal counsel for the State agency.''

Federal Agency Delays.—New language in Article II required the Federal agency to make supplementary payments ''at such times'' as the agreement specified and to impose deductions for a recipient's failure to report changes ''as promptly as is feasible.'' Article II also specified that fiscal reports be furnished the state ''not less frequently than monthly.'' The new state payment provision (quoted above) which allowed a state to withhold payment until receipt of the SDX payment data filed reflected even more forcefully a concern with Federal promptness.

b. SSA Initiated Changes

The Social Security Administration was itself not totally satisfied with the 1973 model agreements. While the states seized the initiative in 1974, the Federal agency also proposed several changes. Ultimately, in addition to the insertion of an express state obligation to comply with subsequent regulations (discussed in the preceding section) and the disputes paragraph revisions (discussed in Part 4), SSA secured two significant modifications. First, it got language in Article XI granting the Secretary a right to suspend payments immediately in the event of a significant state payment default. The new provision read:

> If the State fails to comply with paragraph G of article III of this agreement [the payment provision], the Secretary may immediately suspend making further supplementary payments . . . , provided that the cumulative amount of unpaid funds by the State is greater than one-third of the total amount which was paid by the State for the calendar quarter immediately preceding the month in which the State does not make such payments . . . .

Second, it was able to tighten up slightly on the terms for Federal reimbursement of state administrative costs by securing in the Article III provision which authorized the state to "perform such other functions as may be necessary to carry out the provisions of this agreement" a new sentence reading: "If the State desires reimbursement by the Secretary pursuant to article VIII-B of this agreement, the State shall obtain the consent of the Secretary before performing such other functions under this paragraph."

3. *Continuation of Formal Cooperation*

Agreement terms were not the only Federal-state issues which still required attention in 1974. At the APWA meeting in February 1974 Social Security Commissioner Cardwell "recommended that there be developed an appropriate committee mechanism under which APWA and SSA would work together on a continuous basis to solve operational problems and to develop and promote possible legislation to improve the SSI program." The mechanism ultimately adopted was a transformed SSI Transition Committee. The new committee, named the APWA-SSA Liaison Committee, represented all APWA constituencies, not simply the NCSPWA. Its membership included "state and local administrators, welfare attorneys, and others represented on the APWA Board of Directors." An even more significant change was the inclusion of Social Security Administration staff. The committee was less seen as a vehicle for bringing state viewpoints together to permit forceful representation before the Federal agency than as a "mechanism" through which state and Federal agencies could cooperately seek solutions to their mutual problems with the new program. The committee, thus, bore a close kinship to the APWA-SSA contract administered by

Irving Engelman. It continued to function from 1974 through 1977 until that contract ended. From time to time numerous subcommittees were established to deal with particular concerns—data exchange, audits and the like.

Describing the work of the APWA-SSA Liaison Committee in late 1974, Sumner Whittier, Director of the Bureau of Supplemental Security Income, said: "The Committee's work in both administrative and legislative areas has proven invaluable to SSI operations. With APWA's cooperation, we have been able to bring together Federal, State, and local public welfare administrators for a common discussion and resolution of SSI problems."

Shortly after the program got underway in 1974, a problem arose which demanded and got prompt attention from the SSI Transition (later Liaison) Committee. It stemmed from the inadequate provision for prompt payment to those whose needs could not wait for a lengthy application process. The law allowed an advance of $100 to applicants in some cases, but the delays in approving applications were so extreme that that amount was insufficient by any test. The states were disposed to meet the interim needs of SSI applicants pending their approval for the Federal program. But, however they did so led to problems. An opinion of HEW General Counsel's office took the view that assistance furnished under such circumstances was not an excludable state supplement (since it was intended to substitute for, not add on to SSI)[98] but instead had to be counted as income, thereby reducing the eventual retroactive SSI payment. Counsel's office also ruled that while states could structure their interim assistance as a loan (which would mean it would not count as income for SSI benefit purposes) the Federal statute would not permit the applicant to assign the initial SSI payment to a state or local government to repay such a "loan." Thus, a state following that route faced difficult if not impossible collection problems.

The interim payment problem was an important item on the Transition Committee's agenda for a February 25 meeting with SSA officials. The discussion led it to recommend to the full NCSPWA that the Council request SSA to see to it that:

> either under existing law, or by new legislation if necessary, provision be made for States to be directly repaid by the Federal Government (to the extent of retroactive SSI eligibility) for assistance payments made to SSI eligibles during the pendency of SSI approvals; and in no event shall assistance payments provided to individuals on a needs basis during the pendency of SSI applications, by the State or its political subdivisions, regardless of the names of the programs under which this is

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98. The statute excluded as income only "cash payments . . . as assistance based on need in supplementation of such benefits [SSI] (as determined by the Secretary)." 42 U.S.C. § 1382e (a) (Supp. V 1975).

> accomplished, be treated as income having an adverse effect on SSI eligibility or amount of entitlement.

The Council adopted that recommendation in full.

As soon as the APWA-SSI Liaison Committee was established, it created a Subcommittee on SSI Interim Payments. That group drafted a proposed amendment to the Social Security Act allowing for assignment of initial SSI benefits to states or local governments furnishing interim assistance and laying out the terms under which such assignments could occur. Its recommendations won the endorsement of the full Liaison Committee, SSA, and NCSPWA. With such joint state and Federal agency backing the amendment moved quickly into law, as part of Pub. L. No. 93-368.[99]

After enactment, the Special Committee on Contracts took over work on the model agreement. It developed a proposed agreement which was submitted to SSA in late August 1974. The agency approved; and in Engelman's Information Bulletin #89, dated September 12, 1974, state administrators received a copy of the model agreement which carried the committee's "affirmative recommendation that it be accepted as a satisfactory model for all States." The committee also drafted a model "authorization" form to be executed by applicants seeking interim assistance, which consented to the issuance of the initial SSI payment to the state or local agency furnishing interim assistance and to deduction by that agency of the amount of such assistance before turning the balance over to the applicant.

C. 1975—No Revision of the Agreements

During 1975 both the Federal agency and the States left the agreements alone. There was plenty enough activity on other fronts. The first year's experience with SSI—lengthy delays in payments, high error rate, failures of the data systems for the program, inadequate staffing—drew criticism and study from every side. Both the House Ways and Means and Senate Finance Committees conducted hearings. SSA Commissioner Cardwell set up a "blue ribbon" SSI Study Group. The NCSPWA presented its views on the situation quite forcefully. A resolution adopted in December 1974 by the Council proclaimed:

> the intense concerns of the States about the many and serious inadequacies and malfunctions in the administration of the SSI program, including particularly the critical insufficiency of staff and resources now available to the Social Security Administration for purposes of that program.

A following resolution urged the Executive Committee to communicate those concerns to the Federal government and to take other "measures calculated to bring about effective correction."

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[99] 42 U.S.C. § 1383 (g) (Supp. V 1975).

The Executive Committee adopted a statement entitled "Immediate Imperatives for the SSI Program" which elaborated on the Council's concerns. It was conveyed to HEW Secretary Weinberger by a letter dated February 5, which asked for a meeting between Wilbur J. Schmidt, Chairman of the Council, accompanied by a few others from the Executive Committee, and the Secretary. Such a meeting occurred on April 7. The NCSPWA representatives which are being undertaken by the Department and the Social Security Administration toward strengthening the effective operation of the SSI program."

A memorandum to state administrators from Engelman dated February 21, 1975, reminded them of the need to serve notice in timely fashion if they wished to terminate any of their agreements. It reported that SSA was not seeking any changes in the national models, and that the Contracts Committee did not consider it had reason to negotiate for changes. The memorandum concluded:

> Proposals, if any, for contract changes which any particular State deems to be necessary as of July 1, 1975, will have to be brought up for consideration at the initiative of the State itself by presentation to the Regional Office. This should be done immediately.

The Contracts Committee asked to be notified of any such individual state effort.

D. 1976—Revision at SSA's Initiative

1. The Negotiations and Their Setting

Through 1975 the NCSPWA Special Committee on Contracts remained a separate group, but in 1976 the APWA-SSA Liaison Committee assumed responsibility for its activities through a Subcommittee on Federal-State Agreements.

By 1976, the Liaison Committee had become a forum in which SSA representatives presented agency positions and received state response. Thus, its undertaking the negotiation of agreement terms on behalf of the States was consistent with a general shift in its function. At the June meeting, for example, the agenda consisted primarily of reports by SSA people on the Federal position concerning alternative methods for arriving at fiscal settlements for FY 1974, FY 1975 and FY 1976 (the three month period through September 1976) and on SSA proposals for the content and design of the new Federal-state agreements to be effective October 1, 1976. During the year SSA showed less enthusiasm for negotiations with the Committee. The agency also appeared uncertain about whether to continue funding the APWA liaison activities which included the work of the Committee. Engelman's Information Bulletin #184, dated May 24, 1976 reported on the current membership of the Liaison Committee, but concluded:

> Since December 1972, the informational, logistic and other staff services for the Committee have been provided by the APWA/SSA Contract Unit and financed in part as expenses under such contract. The termination date of the existing contract is June 30, 1976. The nature of the specific arrangements under which continuing liaison activity between the Social Security Administration and the public welfare community will be maintained after that date has not yet been established.

The Congressional Budget Act of 1974 changed the start of the Federal fiscal year from July 1 to October 1.[100] The shift occurred in 1976, creating a "transitional quarter" July 1, 1976 through September 30, 1976. SSA determined that it wished to substitute new agreements for the old forms at the start of the new style fiscal year and that to cover the "transitional quarter" it would require execution of a short form extending the outstanding agreements for three months. In late June 1976 the Liaison Committee reviewed the extension forms (which had already been sent to the Regional Offices for presentation to the states). It objected to a one-sided provision which expressly preserved SSA's right to assert a certain position under the original agreements but said nothing about a comparable right for the state. The Liaison Committee promptly secured SSA agreement to the substitution of a clause reading:

> Nothing in this modification shall be construed as waiving the state's or SSA's rights to assert any position arising out of or under the agreement hereby extended as to the imposition by the Secretary of fiscal sanctions under the AFDC program or as to Federal fiscal liability for erroneous payments under the SSI program.

That clause was teletyped to the Regional Offices by SSA, and a memorandum from Norman Lourie, Chairman of the APWA-SSA Liaison Committee, advised state administrators:

> If you are presented with one or more of these agreements, as appropriate to your particular situation, with a request for the promptest possible execution by your State, it is the recommendation of the Liaison Committee that you do so if the correct substitution for [the objectionable clause] has been incorporated.

The extension agreement(s) which states signed expressly contemplated new agreements for FY 1977:

> 1. The date of termination of the aforesaid agreement shall be September 30, 1976. The automatic renewal provision of such agreement shall not, however, apply.

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[100] Pub. L. No. 93-344, § 501, 88 Stat. 297 (1974), codified at 31 U.S.C. § 1020 (Supp. V 1975).

> 2. It is the intent of the parties that before August 1, 1976, the Secretary and the State shall negotiate and execute an agreement . . . for fiscal year 1977.

Thus, for the first time since 1973 the subsequent discussions between the states and SSA over agreement terms took place in a situation that required some affirmative action by the parties, some new agreement, for there to be a continuing arrangement (beyond September 30, 1976). (The NCSPWA Contract Committee had threatened to recommend that states serve notice of non-renewal at an early point in the 1974 negotiations, but it never did).

The proposed new agreement terms tendered by SSA for FY 1977 (to take effect October 1, 1976) were not favorably received by the states. Some fifteen state representatives who had seen the forms participated in discussions of the Liaison Committee's Subcommittee on Federal-State Agreements in early August 1976. A summary of those discussions reported: "Many of the proposed changes . . . were regarded by the State representatives as unconditionally unacceptable; others were regarded as seriously controversial and therefore subject to intensive debate and negotiation; and others required more careful review and analysis than [the subcommittee then had time for]." State administrators were urged to review the drafts pertinent to their state and to send their comments to the Subcommittee "which is establishing a schedule of further working sessions with Federal representatives."

Resolution of the significant differences between the Subcommittee and SSA representatives was not reached prior to the beginning of the fiscal year. Even Agreement #1 about which there was less controversy was not approved by the subcommittee until October 5 while discussions over the others continued.

On October 14, (two weeks after the expiration date of the old agreements), Norman Lourie of Pennsylvania, Commissioner Ellis's replacement as Chairman of the APWA-SSA Liaison Committee sent a telegram to HEW Secretary Mathews seeking his intervention in the stalemated negotiations. His message noted that the deadline was passed and explained: "SSA seeks to include in such agreements certain key provisions in terms which are totally unacceptable to all states and which are not mandated by statute or official regulations. . . . The delay in concluding mutually acceptable agreements is severely impacting our mutual abilities to administer the program."

Further negotiations between SSA and the Subcommittee on Federal-State Agreements followed. On November 11, 1976, Engelman on behalf of the Subcommittee advised state administrators that agreements #2 and #3 had been revised "in terms assented to by negotiating parties as mutually acceptable for current purposes (i.e., to be effective as of October 1, 1976 for FY 1977, unless subsequently revised within such fiscal year)." He noted in particular that the revised models, bearing the date November 8, 1976 "include a special appendix which comments on the understandings of the parties with respect to Article IX on Federal Fiscal Liability." The Subcommittee recommended execution of the final model of the appropriate agreement. Proposed changes in Agreement #4 (federal determination of Medicaid eligibility) remained unsettled. The Subcommittee recommended that all affected states accept SSA's offer of a simple extension of the existing agreement without substantive change "provided, however, that the extension carry an expiration date as of March 30, 1977 (instead of September 30, 1977)"

2. *The Revised Terms*

Whereas a draft prepared by the NCSPWA Contract Committee launched negotiations in 1974, an SSA draft set the basis for Federal-State discussions in 1976. That draft and the negative state response to it reflected the substantial difficulties experienced by both parties under the original agreements. By the summer of 1976, the audit reports for the first six months of 1974 were available and Federal liability for errors during that period was a disputed subject, a matter discussed in detail in Part 4. The question of future audits had great prominence because of that recent experience. State demands for more complete accounting data, Federal displeasure over what it viewed as excessive claims for reimbursement for state administrative expenses, and the spill-over of the litigated dispute concerning penalties for state errors in making AFDC payments were all reflected in the proposed SSA revisions and state reaction to them.

a. Audit Rights and Accounting Data

The SSI Surveillance Committee (a committee comprised of state audit officials which oversaw the HEW Audit Agency's audit of the first six months of 1974 (see Part 4, *infra*)) had recommended that the next agreement grant: "the participating states . . . the right to perform an audit without being subject to any mutual agreements with the Secretary as to the manner in which an audit should be performed." Following up on that recommendation, the successor Committee on Audits recommended specific agreement language to the APWA (neither group was directly affiliated with the APWA) dealing both with audit rights and with accounting data. The former provided:

> The Secretary agrees that the State (including its authorized representatives) shall have access to and the right to examine any pertinent books, documents, papers, and records of the Department of Health, Education and Welfare involving transactions related to this agreement. The Secretary and the State further agree that there shall be a cooperative exchange of audit working papers between the HEW Audit Agency and the State's audit agency.

The Committee's recommended provision on accounting data read:

> Upon request of the State, the Secretary shall furnish the following information to the State relating to supplemental payments made by the Secretary on behalf of the State:
>
> 1. The name, the address, the social security number, and amounts of supplemental payments made to the recipient during the same period of the statement rendered by the Secretary of the State.
>
> The Secretary and State agree that the State shall make no payments to the Secretary for any supplementary payments to any recipients for which the Secretary is unable to furnish all of the above information to support his statement to the State; or in any case in which the Secretary has included and paid a recipient who does not have a qualified residence, as defined herein, within the State.

In sharp contrast to such state desires, the SSA draft included a new audit article which granted the state "the right to conduct an audit within one year after the close of the fiscal year being audited," but still required mutual agreement upon time and place, and went on to say:

> The purpose of any such audit will be to verify that the amounts reported as paid by the Secretary as supplementary payments and mandatory minimum supplements on behalf of the State were expended by the Secretary. The audit will not be used to determine whether such amounts were erroneously paid nor to assign fiscal responsibility for erroneous payments.

It also listed nine items which it said were the "only . . . supporting documentation [to] be made available by the Secretary for review in connection with the audit."

The new provisions on accounting data offered no more than the following:

> The Secretary is developing the capability to provide the State with monthly case-by-case accounting data with respect to the automated disbursements included in [the] monthly Financial Accountability Statements (SSA-8700) received by the State for periods beginning on or after October 1, 1976. When available, such financial accounting data will be furnished by the Secretary to the State upon the State's request.

In both cases negotiations ultimately produced significant movement in the Federal position. The 1976 model agreement forms approved by the APWA Contract Committee and SSA in November provided in Article IV:

> The Secretary recognizes the right of the State (including its authorized representatives) to conduct audits and in connection with any such audit, to examine any pertinent books, documents, papers, or records of the Secretary related to payment and denial of claims and to

> expenditures made by the Secretary on behalf of the State for State supplementary payments and mandatory minimum supplements. The audit shall be at State expense except that those books, documents, papers, or records customarily provided free of charge for audit purposes shall be so provided by the Secretary. No such audit shall extend to any inquiry into the Secretary's administrative or operational activities and practices. The results of such audits shall not be used for determining FFL [Federal Fiscal Liability] for erroneous payments. The State shall initiate its request to conduct any audit no later than 1 year from the close of the fiscal year to be audited. The audit shall be completed within 3 years of the close of the fiscal year to be audited. The Secretary and the State further agree that there shall be a cooperative exchange of audit working papers between the HEW Audit Agency and the State. The State may elect to conduct its own audit, to participate in a joint audit with other States, or to have an independent public accountant represent the State in conducting such audit. The Secretary shall, within 60 days after the State notifies the Secretary of its intention to conduct any audit, propose a reasonable time and place for the conduct of the audit.

Appendix B added this gloss:

> Section C of Article IV provides that neither the results of State audit nor the results of the State's quality assurance reviews may be substituted for the provisions of Article IV as the basis for determining Federal fiscal liability for erroneous payments. The Secretary will, however, take into account those results as they pertain to the accuracy of determination of erroneous payments in the SSI quality assurance process specified in Article IX.

The section on accounting data in Article II read:

> Upon the State's request, the Secretary shall, no later than January 1, 1977, provide monthly case-by-case accounting data with respect to the automated disbursements, including such monthly accountability statements (SSA-8700) received by the State for periods beginning on or after October 1, 1976. It is the intention of both parties that as soon as feasible all aggregate items appearing on the Financial Accountability Statements subsequent to the time that it is feasible shall be accompanied by or reconcilable to supporting data which shall include automated and manual disbursements, collections by withholding, by cash refunds, by returned checks or any other means, and any other element used in computing total expenditures, such as postentitlement adjustments and miscellaneous expenditures.

b. Federal Liability for Errors

For the periods beginning after 1974 the first two versions of the model agreements had established a system of measuring Federal liability for erroneous eligibility and payment decisions that was tied to the system which HEW was introducing, over strenuous state opposition, in the AFDC program:

> [T]he Secretary's liability for any State-funded mandatory minimum supplement or supplementary payments made on behalf of the State which was erroneously paid to any individual shall be determined in a manner similar to that for determining the State's liability for erroneous payments made to ineligible recipients and for overpayments, as provided for in 45 CFR 205.40 and 45 CFR 205.41 (the Social and Rehabilitation Service's regulations applicable to the State's program of Aid to Families with Dependent Children), *but only to the extent aid only for so long as* the State is complying with the provisions of 45 CFR 205.40 and 45 CFR 205.41 with respect to the State's Program of Aid to Families with Dependent Children.

In May 1976, the U.S. District Court for the District of Columbia held those AFDC regulations invalid in *Maryland v. Mathews.*[101] (In addition to Maryland, thirteen other states had joined in the suit as plaintiffs or plaintiff-intervenors). During the summer of 1976, SSA took the position that the elimination of those regulations and state liability for errors in AFDC removed a precondition for Federal liability. The paragraph of SSA's proposed form for extending agreements to cover the "transitional quarter" which, as noted earlier aroused state objections, had said:

> Nothing in this agreement shall be construed as waiving SSA's position that there is no Federal fiscal liability for any period after December 31, 1974, for which the States are not liable to fiscal disallowances under the provisions for 45 CFR 205.40 and CFR 205.41 with respect to the State's program of Aid to Families with Dependent Children.[102]

Consistent with that view, the draft agreement tendered the states by SSA in the summer of 1976 contained the following totally new article on "Federal Liability for Erroneous Payments":

> The parties take notice that the Secretary and the States are endeavoring to develop a common system or related systems for determining and assessing liability for erroneous payments under the program of Aid to Families with Dependent Children and under the supplemental security income program. Accordingly, the Secretary agrees to modify

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[101] Maryland v. Mathews, 415 F. Supp. 1206 (D.D.C. 1976).

[102] For that language the final form substituted a sentence preserving both parties' rights "to assert any position arising out of or under the agreement hereby extended" as to liability for errors. *See* p. 119 *supra.*

> this agreement (upon development of such system or systems) to provide for Federal liability for erroneous payments under the supplemental security income program comparable in timing and the degree of liability to that agreed to by the State under the program of Aid to Families with Dependent Children. Until such modification is executed, the Secretary shall not be liable to the State for any erroneous payment of supplementary payments or mandatory minimum supplements.

The fact that the Federal agency finally relented on this point probably had more to do with state acceptance of the 1976 forms than any other change of position during the negotiations. The final Article IX acceded to the state view that *Maryland v. Mathews* had no effect on Federal liability for SSI supplementation errors. In addition to a new paragraph in the article itself which said as much, Appendix B of the 1976 forms contained the following "Commentary on Federal Liability for Erroneous Payments" explaining the new paragraph's intent:

> The language of Article IX has been modified to reflect that the provisions of the prior agreement on Federal fiscal liability (FFL) shall be carried forward to the present agreement period. These provisions shall be effective until the effective date of any new regulations promulgated on quality assurance for the AFDC and SSI programs. At the time of promulgation this article will be renegotiated, with no liability accruing for the Secretary under the SSI program [after those future regulations take effect] until mutual agreement at which time liability will be effective retroactively to the effective date of the new regulations. The States will be considered to be in compliance [with the AFDC systems] for any 6-month period where the Secretary has not made a formal finding of noncompliance. Absent such a finding, the Secretary will be liable for erroneous payments under the SSI program for such periods.
>
> This language is provided by way of clarification of the Secretary's position with respect to the following items:
>
> 1. Maryland v. Mathews cannot be used as a defense against the Secretary's liability for erroneous payments under the SSI program;
> 2. The Secretary would continue to be liable for erroneous payments above a 3 percent case error level for ineligibles and a 5 percent case error level for overpayments.
> 3. A State will be in compliance with 45 CFR 205.40 and 45 CFR 205.41 for any 6-month period until the Secretary makes a formal determination of noncompliance with any such determination being applicable only to the 6-month period for which the determination is made.
> 4. The fact that a State has an error rate in the AFDC program above the tolerance level established will not in itself constitute the State being in noncompliance. If a State pays the appropriate penalty for any period of noncompliance, the State will be

then found to be in compliance for purposes of FFL under the SSI program.

The State also secured new language dealing with a particular type of erroneous payment that they found especially troubling. Many states had had the experience of reporting changes (or new information) on the income, living situation, or residence of supplement recipients to the Social Security Administration without that information having any prompt effect on payments. A provision in Article II of the 1976 forms stated:

> Subject to verification by the Secretary and any required opportunity for hearing before suspension, reduction or termination of benefits, [the Secretary shall] take action as promptly as feasible to determine and pay the correct amount of supplementary payments or mandatory minimum supplements following receipt of notice from the recipient, the State, or any political subdivision thereof concerning a change in living arrangements, income, or other factors which may affect a recipient's amount of such payments or supplements.

c. Reimbursement of State Costs of Administration

A third area in which the 1976 SSA draft substituted provisions with which the states were dissatisfied was Federal reimbursement of state administrative expense. Although negotiations softened the provisions somewhat, the 1976 agreements set up much tighter controls. They introduced a system of budget request in advance of the fiscal year with review by the Secretary producing a notification to "the State of the amount which will be made available to it." That amount the State agreed it would "use its best efforts" not to exceed. "If at any time the State has reason to believe that the costs which it expects to incur in its performance . . . will exceed [the approved amount] it shall notify the Secretary, in writing, to this effect, giving its revised estimate of such total costs."

In addition to such procedural controls, the agreements specified those functions performed in connection with the mandatory supplements for which reimbursement was available, required "written consent of the Secretary before" the performance of other functions for which the State wished to seek reimbursement, and expressly excluded two areas from reimbursement, namely: (1) "any activity related to the determination of an optional supplement variation," and (2) "furnishing the Secretary with data related to current State programs," e.g., AFDC, general assistance, Food Stamps.

The one significant concession the states were able to obtain appeared in a new Article III, J:

> In determining the amount of reimbursement of indirect costs related to functions approved by the Secretary, the State shall use the State's administrative cost allocation plan approved by the cognizant Federal agency.

d. Effect on the Agreement of Subsequent Regulations

The SSA draft made no significant changes in the 1974 agreements' treatment of the state's obligation to comply with formally promulgated regulations. In the course of negotiations, the states pursued this continuing source of concern, a concern which was exacerbated by the uncertain status of the prior agreements' provisions covering Federal Fiscal Liability for errors with their express tie to HEW regulations. This led to the addition of two sentences in the final forms qualifying the state's commitment to be bound by future regulations:

> With respect to regulations which alter specific Federal and State responsibilities for administration and fiscal responsibilities as stipulated in this agreement, promulgated during the term of this agreement, the State shall not be required to comply therewith until the agreement is extended or renewed for any additional period or periods. The State and Secretary may mutually agree, however, to comply with any such regulation during the current agreement period.

Consistent with that general approach, the provisions on Federal liability for errors, discussed above, called for renegotiation of the agreement when regulations on the subject were subsequently issued instead of contemplating that the regulations would themselves have direct effect on the parties' relationship.

e. Clearer Guidelines for Eligibility Decisions

Perhaps as a consequence of disputes over rates of erroneous payments, with the associated issue of what constitutes an error, the Federal agency sought and got, in 1976, more explicit provisions dealing with how SSA would determine eligibility for the state's supplement. SSA's draft added to Article V, ("Amount of and Payment of Supplementary Payments and Mandatory Minimum Supplements") a provision which specified that "eligibility [for supplementary payments] shall be determined in accordance with title XVI of the Act and regulations thereunder." The states accepted it in the final agreements. They also accepted a new provision which the draft added by way of elaboration on a term which had been in the 1974 agreements (though not the original 1973 forms). ("No mandatory minimum or supplementary payment shall be payable to an individual for any month . . . [f]or which such individual is not a resident of the State. In the absence of any other evidence pertaining to residency, for purposes of this provision, an individual shall no longer be presumed to be a resident of the State after he is outside the State for any period of 90 consecutive days.") The 1976 provision was both more detailed and broader in its impact:

> For purposes of this agreement [not just "this provision"], an individual will cease to reside in a State if he leaves the State with the present intention to abandon his home there. In the absence of evidence to the contrary,

1. If an individual leaves the State for a period of 90 calendar days or less, his absence from the State will be considered temporary and he will be considered to continue to reside in such State; and
2. If an individual leaves the State for a period in excess of 90 calendar days, he will no longer be considered to reside continuously in such State.

f. Deletions Successfully Fought by the States

The SSA draft deleted three other provisions contained in the prior agreements: the section of Article II which obligated the Federal agency to conduct studies and evaluations; the language in Article VI which allowed a state to hold off making payment until 5 days after receipt of the SDX payment data file, and the sentence in the Disputes paragraph which stated: "Nothing in this agreement shall be construed to waive the State's right to seek judicial review by a court of competent jurisdiction of both findings of fact and conclusion of law contained in the Secretary's decision." State protest led to all three being put back in, in the latter case with the addition of an express reservation of the "Secretary's right to assert lack of jurisdiction." The final provision concerning studies and evaluations expressly excluded decisions about whether a state-requested study should be Federally financed from the disputes procedure.

g. Disputes and Termination

Changes in both the disputes and termination provisions were proposed by SSA and negotiated by the States. The results are more completely described in Part 4, infra. However, one, the inclusion of some specific time limits for Federal determinations on matters subject to the disputes procedure, was counted by the States as a significant gain.

h. The Parties' Relationship

A nuance of symbolic importance to the states was the inclusion in Article II, A, B, and C of the phrase "on behalf of the State." Thus, under the 1976 model agreements, when the Federal agency undertook to make determinations of eligibility, to make payments, and to establish the amount of such payments, it expressly did so "on behalf of the State."

E. 1977—An Apparent End to Negotiation Through the APWA

By 1977 HEW's recognition of the APWA as the exclusive bargaining agent for the states, during negotiation of agreement terms, had effectively ended. Even at the time that the Subcommittee on Federal/State Agreements of the APWA Liaison Committee (the successor to original Contract Committee) reported final approval of the 1976 model agreements in November of that year, it noted that the discussions between HEW and the states over the systems to be used in the future to measure liability for errors in AFDC and SSI were taking place elsewhere. The Task Force on Quality Control of the New Coalition was preparing recommendations for HEW on the subject.[103] It (the subcommittee) was to be involved though only as a specially invited participant. The New Coalition, not welfare administrators but a group of elected state and local officials representing the National Governors' Association, the National Conference of State Legislatures, the National Association of Counties, the U.S. Conference of Mayors and the National League of Cities, had been drawn into this question. However, only that one issue—which had generated both important Federal-state litigation and sizable liability claims, in short a significant Federal-state confrontation—not the terms of the agreements generally commanded New Coalition attention.

Clear evidence of APWA's new outsider role on agreement terms came later in 1977. Pub. L. No. 94-585, enacted in October 1976 with an effective date of July 1, 1977, required a new form of agreement concerning state supplement "pass-along" of federal benefit increases.[104] Mr. Engelman notified state administrators on July 5 that:

> On June 27, 1977, SSA transmitted to all Regional Commissioners a model form of agreement on this subject, with instructions that such model be used in negotiations to have the States sign a suitable agreement as soon as possible.
>
> For your information, the APWA/SSA Liaison Committee was not a participant in the development of such model agreement and no analysis or advice with respect thereto on behalf of the Committee is presently available.

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[103] The very memorandum from Engelman to State Public Welfare Administrators that reported subcommittee approval of the 1976 model agreements noted:

> At the request of the Office of the Secretary, the Ad Hoc Subcommittee has been invited to participate with the Task Force on QC of the New Coalition in addressing the issues involved in the structures of QC in AFDC and QA in SSI, and the use of such structures in determining allocations of Federal State fiscal liabilities under the respective programs. The Subcommittee will make no commitments or offers on these issues, on behalf of the Liaison Committee or on behalf of the National Council of State Public Welfare Administrators, without first presenting its views and recommendations to those bodies for review and authorizations.

An internal memorandum of the California Health and Welfare Agency concerning the 1976 agreements, dated November 24, 1976, reported that HEW contemplated issuing new regulations "regarding fiscal sanctions under the AFDC, SSI and Food Stamp Programs" and that the agreements provided for that eventuality. It went on to say:

> Presently, the New Coalition is preparing recommendations for HEW on this issue. We are in the process of providing input to the new Coalition so as to fully protect our interests.

[104] *See* Pub. L. No. 94-585, § 2, 90 Stat. 2901 (1976), codified at 42 U.S.C.A. § 1382 g (Supp. 1978).

Moreover, Committee efforts to engage HEW in negotiations over Agreement #4 (federal medicaid determination) met with no success.

F. How the Model Agreements Were Used in Dealings With Individual States

1. The Initial Version (1973)

The 1973 Model Agreements, like those to follow, left a number of areas for individual negotiation between a state and SSA. That was not only true of the key determinants of the "hold harmless" formula—relevant to a few important states, but also of the state payment level variations and the living arrangement definitions which governed them—a consideration for all optional supplement states. Appendix A of the Model Agreements furnished the space for these particular agreements.[105]

In other respects, though, while styled "model agreements" the terms were treated as essentially mandatory. States were not free to negotiate significantly different provisions. However, they were permitted in a few instances, to modify the language of the Model in minor ways that in SSA's judgment merely clarified intent or accommodated a state's own legal requirements.[106] Thus, for example, the agreement with Iowa for the period January 1, 1974, through June 30, 1974, incorporated these modifications:

a. In Article VI the phrase "monthly advance of funds" by the state was changed to "monthly payment" and a footnote indicated the payment was to be made "on or before the date payment is to be received by recipient." (This change was subsequently incorporated in the 1974 Model Agreements).

b. The disputes paragraph was amended to assure that the Secretarial determinations would be furnished "in writing;" that not only the State but the Secretary would "proceed diligently with the performance" of the agreement pending resolution of a dispute; and that administrative determinations under the paragraph might be reversed by a court of competent jurisdiction which found "the same to have been arbitrary or contrary to law."

c. Finally, the Termination article was modified so that Secretarial terminations in the event of state noncompliance could occur only if a state failed "to materially comply."

2. The 1974 Version

Initiative for the 1974 amendments came from the states. SSA did not

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[105] Agreement #4 had remained unchanged since the original form was put together in 1973. Since, on the Federal side, that agreement involved initially SRA and after the 1977 HEW reorganization the Health Care Financing Administration, changes required more than SSA's participation.

[106] These individualized provisions could be quite complex. The Hawaii agreement for January 1, 1974 through June 30, 974 contained six pages of living arrangement definitions in Appendix A.

2. *The 1974 Version*

Initiative for the 1974 amendments came from the states. SSA did not serve notice to prevent the automatic renewal of the original agreements. Consequently, the 1974 agreements were offered states formally as alternatives to renewal of the original terms. The individual states, judging the new versions superior, agreed to the substitution. The existence in all cases of agreement terms, which would carry forward if the parties did nothing, removed the pressure on SSA for acceptance of individual state modifications of the new Model Agreements.

3. *The 1976 Version*

The terms on which SSA extended the agreements to cover the 1976 "transitional quarter" saw to it that automatic renewal of the prior agreement terms did not occur. However, the failure of negotiations to yield a satisfactory replacement by the end of the "transitional quarter" led the agency to treat the agreements as being renewed. Once the APWA committee and SSA reached agreement in November, states were given an option between the new terms and the old. An intra-agency memorandum for Mario G. Obledo, Secretary of the California Health and Welfare Agency, reporting on the subsequent bargaining sessions with SSA over the agreement, described the agency's position:

> SSA made it clear in these meetings that our only alternatives were to extend the old agreement or to agree to a new agreement incorporating the provisions set forth below [the 1976 version].

California and most other states opted for the new terms. The California memorandum, quoted above, expressed the judgment that: "the new agreement represents substantial improvements over the agreement we have had in the past." Many states were slow in coming to that conclusion, however; execution of the new form in some cases occurred well into 1977.[107] And a few states chose simply to extend the earlier form.[108]

While states had a choice, it was a choice between the 1974 Model Agreement terms and the 1976 version; no opportunity to negotiate individual variants was offered by SSA.

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[107] Delaware did not execute the new agreement until January 1977; Maryland, February 1977; Maine and Rhode Island, July 1977; and Florida, August 1977.

[108] The form which HEW used to extend the agreements at the point the 1976 negotiations came to impasse extended the prior agreements for fiscal year 1977 but stated:

> It is the intent of the parties that the Secretary and the State shall negotiate and execute a new agreement . . . for fiscal year 1977. The parties agree that upon their execution of the new agreement, such new agreement shall supersede this modification . . .

With some states—Nevada, for example—a substitute agreement was never executed, with the result that the 1974 agreement terms remained in force.

PART 4. RESOLVING DISPUTES UNDER THE AGREEMENT—IN THEORY AND IN PRACTICE (1974–1977)

A. The Terms of the Disputes Paragraph

The evolution and final terms of the disputes clause contained in the 1973 Model Agreements have already been described in Part 3.[109] As noted there, the clause appeared as a paragraph in the article entitled, "State Funding and Final Settlements." In context it seemed reasonably certain that the procedure the paragraph outlined was intended to apply primarily, if not exclusively, to disputed items arising out of the negotiations over "a final determination of State liability for supplementary payments and mandatory minimum supplements paid on behalf of the State." Such negotiations were to come after the conclusion of the agreement term. (The agreement did, however, include other articles which incorporated that disputes paragraph by reference. *See* section A-2(b) *infra.*)

Negotiations in 1974 and 1976 both produced some revision of the disputes paragraph itself as well as the other provisions of the agreements bearing directly on it.

1. Revisions of the Disputes Paragraph Itself

a. The 1974 Version

The "State Funding and Final Settlements" Article of the 1974 Model Agreement #3 (Federal Administration of Mandatory and Optional Supplementation) contained the following "disputes" language:

> D. If the Secretary and the State are unable to agree upon any item in dispute, an official designated by the Commissioner of Social Security shall make an initial determination and inform the State, in writing, of his determination with a full explanation thereof. This determination shall be final and conclusive unless, within 30 days the State requests the Commissioner of Social Security to reconsider this initial decision, whereupon the Commissioner will reconsider the initial determination and inform the State, in writing, of his determination with a full explanation thereof. This determination shall be final and conclusive unless the State files a written appeal to the Secretary within 30 days. If the State appeals the Commissioner's determination, the Secretary will review the reconsideration and, on the basis of the evidence obtained by or submitted to the Secretary, he shall render a decision affirming, modifying or reversing such determination. In notifying the State of his decision, the Secretary shall state the basis thereof. In connection with the Commissioner's or Secretary's review, the State

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[109] *See* pp. 105–107 *supra.*

> shall be afforded an opportunity to be heard and to offer evidence in support of its position. Pending the decision of the Secretary, the State and the Secretary shall proceed diligently with the performance of this agreement. The delegate of the Secretary who makes the decision shall not be the Commissioner of Social Security or any subordinate of the Commissioner of Social Security.
>
> Nothing in this agreement shall be construed to waive the State's right to seek judicial review by a court of competent jurisdiction of both findings of fact and conclusion of law contained in the Secretary's decision.

Among the changes from the 1973 version were these:

(1) The "initial determination" on a disputed item was to be made by "an official designated by the Commissioner of Social Security" rather than "an official designated by the Secretary."

(2) A reconsideration at the level of the Commissioner of Social Security was added, coupled with assurance that on an appeal from that reconsideration to the Secretary "the delegate of the Secretary who makes the decision shall not be the Commissioner of Social Security or any subordinate of the Commissioner."

(3) Shorter (30 day) limits for requests for reconsideration and appeal were set. Under the 1973 version the periods in both cases were 90 days.

(4) The language assuring the independence of those designated by the Secretary or Commissioner of the Social Security Administration to render a decision "based on his own judgment of the facts and the law" was deleted.

(5) A simple reservation of "the state's right to seek judicial review by a court of competent jurisdiction of both findings of fact and conclusion of law contained in the Secretary's decision" on an appeal from a Social Security Administration reconsidered decision was substituted for the original language which explicitly noted the limited finality of Secretarial decisions on questions of fact and law.

Changes (3) and (4) both removed specific gains over the original SSA draft the states had achieved during the 1973 negotiations.

b. The 1976 Version

Further significant changes were incorporated in the 1976 Model Agreements. The relevant paragraph of their "State Funding and Final Settlement" Article reads:

> D. If the Secretary and State are unable to agree upon any matter in dispute arising under this agreement, the State may request the Associate Commissioner for Program Operations, SSA, to make an initial determination. Within 90 days from the receipt of such request, the Associate Commissioner for Program Operations, SSA, or his designee, shall make an initial determination in writing with a full explanation

> thereof, or provide written notification of the reason such determination cannot be made, what further information or actions by the parties may be required, and within what time period a determination is expected to be made. This determination shall be final and conclusive unless within 30 days the State appeals to the Commissioner of Social Security to reconsider the initial determination. Within 90 days the Commissioner shall inform the State, in writing, of his determination with a full explanation thereof, or provide written notification of the reasons such determination cannot be made and what further information or actions by the parties may be required. This determination shall be final and conclusive unless the State files a written appeal to the Secretary within 30 days. If the State appeals the Commissioner's determination, the Secretary shall review and render a decision affirming, modifying, or reversing such determination. In notifying the State of his decision, the Secretary shall state the basis thereof. In connection with the Secretary's review, the parties shall be afforded an opportunity to be heard and to offer evidence in support of their positions before the Grant Appeals Board of the Department of Health, Education and Welfare. Pending the decision of the Secretary, and State and the Secretary shall proceed diligently with the performance of this agreement. Nothing in this agreement shall be construed to waive the State's right to seek judicial review by a court of competent jurisdiction of both findings of fact and conclusion of law contained in the Secretary's decision, or to enforce its rights under this agreement by any available remedies. Nothing in this agreement shall be construed as waiving the Secretary's right to assert lack of jurisdiction with respect to any suit brought under this agreement, or to enforce the Secretary's rights under this agreement by any available remedies.

Among the noteworthy modifications are:

(1) The clause, while still in the "State Funding and Final Settlement" article, purports for the first time, to apply to "any matter in dispute arising under this agreement."

(2) The initial decider has become the "Associate Commissioner for Program Operations, SSA, or his designee."

(3) States are assured of a decision on reconsideration by the Commissioner within 90 days of an appeal or "written notification of the reasons such determination cannot be made and what further information or actions by the parties may be required." The initial decider is also to provide such notification in the event a determination cannot be made.

(4) Concerning the "Secretary's" decision, the clause no longer assures against delegation to the Commissioner of Social Security or his subordinate but it does—at that level—provide that the opportunity to "be heard and offer evidence" shall be "before the Grant Appeals Board of the

Department of Health, Education and Welfare." The authority to render a decision is, however, not delegated to that Board, simply the function of conducting a hearing.

(5) The reference to potential litigation is expanded: The state expressly reserving its right "to enforce its rights under this agreement by any available remedies" and perhaps more importantly the Federal agency reserving its "right to assert lack of jurisdiction with respect to any suit brought under this agreement, or to enforce the Secretary's rights under this agreement by any available remedies."

2. *Other Revisions Directly Affecting the Disputes Paragraph*

a. Timing of the Settlement Negotiations from which Disputes Might Arise

The 1973, 1974 and 1976 agreements differed concerning when a dispute as to State (and Federal) liability would be ripe for submission to the administrative process established by the disputes paragraph. The 1973 "State Funding and Final Settlements" article stated that "negotiations on a final determination of state liability for supplementary payments and mandatory minimum supplements paid on behalf of the State in each fiscal year . . . [should] be undertaken by the Secretary and the State *as rapidly as possible after audit*." (Emphasis added). This gave rise to substantial delays. No audit reports for the first six months of 1974 were available until March 1976. Attempted settlement was to follow audit, and the only "disputes" clearly governed by the disputes paragraph were those arising from a failure to settle.

The 1974 agreements called for year-end settlement negotiations to begin within 90 days after completion of the "reconciliation" specified in a paragraph which directed the Secretary to submit "a statement to the State showing total amounts expended as supplementary payments and mandatory minimum supplements by the Secretary on behalf of the State during the fiscal year, the State's total liability therefor, and the end-of-year balance of the State's cash on deposit with the Secretary (if any)" as soon as possible after the close of the year. In other words, under the 1974 agreements the process did not necessarily await the audit about which both the 1973 and 1974 agreements stated:

> The State shall have the right to conduct an audit and the Secretary and the State shall mutually agree upon a satisfactory audit arrangement to verify that the supplementary payments and mandatory minimum supplements paid by the Secretary on behalf of the State were made in accordance with the terms of this agreement.

However, for the period through December 1974, the article covering "Federal Liability for Erroneous Payments" set a measurement of liability on which audit findings were pertinent; hence, effective negotiations over a settlement, through fiscal year 1975, had nonetheless to await audit. As to later periods, however, Federal liability was to be established by a formula keyed to the Social Security Administration's Quality Assurance system not audit, permitting settlement of final liability or failure to settle giving rise to a dispute to occur much earlier.

Under the 1976 agreement which contained more elaborate details on state audit, direct connection to Federal liability for errors was renounced: "No such audit shall extend to any inquiry into the Secretary's administrative or operational activities and practices. *The results of such audits shall not be used for determining FFL* [Federal fiscal liability] *for erroneous payments.*"[110] The 1976 "State Funding and Final Settlements" article like the 1974 version provided that negotiations over a fiscal year should begin with the Federal agency's year-end statement, not a subsequent audit. The explicit separation of audit from liability questions made that point even clearer.

b. Cross-References to the Disputes Paragraph

The 1973 agreement forms all provided for Federal reimbursement of certain state administrative expenses. The pertinent article concluded: "These costs are subject to audit and to the provisions of paragraph E, Article VI of this agreement" [the disputes provisions]. The "State Funding and Final Settlements" article also provided that the negotiations over the first agreement period (January 1 to June 30, 1974) would "include the audit adjustments, if any, of the provisional amounts" set forth in the agreement's appendix as the non-Federal share of calendar year 1972 expenditures and the State's Adjusted Payment Levels—the key elements of the "hold harmless" equation—thus clearly bringing these questions under the disputes procedure. Finally, the article entitled "Termination and Modification of Agreement" implicitly granted states the right to utilize the disputes procedure in the event of a Secretarial termination for asserted state non-compliance with the agreement. Paragraph D of that article provided:

> Nothing in this agreement shall be construed to preclude the Secretary from terminating this agreement in less than 120 days [termination on 120 days written notice being authorized without cause by either party] if the State fails to comply with [various paragraphs] of Article III of this agreement (which shall include the failure of the State to make payments in a timely manner under Article IV) and fails to cure such noncompliance, or request an initial determination under paragraph E of Article VI of this agreement, within a period 30 days (or such longer period as the Secretary may allow) after provision by the Secretary of notice explaining the grounds for the proposed termination.

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[110] This was qualified slightly by a gloss contained in the appendix. *See* p. 125 *supra*.

The 1974 agreements contained the same cross-reference in the article covering Federal reimbursement of state administrative costs; however, the article entitled "Termination and Modification of Agreement" no longer mentioned use of the disputes procedure as a possible response to receipt of a Secretarial notice of termination for an alleged state failure to comply with the agreement terms. The 1974 version said simply:

> Nothing in this agreement shall be construed to preclude the Secretary from terminating this agreement in less than 90 days [the notice period for terminations at will under the 1974 agreements] if the State fails to materially comply with the terms of [various] paragraphs . . . of article III of this agreement and fails to cure such noncompliance, or *fails to request an opportunity to show cause why such agreement should not be terminated,* within a period of 30 days (or such longer period as the Secretary may allow) after provision by the Secretary of notice explaining the grounds for the proposed termination. If the State fails to comply with paragraph G of article III [which sets the schedule for state payments to the Federal agency], the Secretary may immediately suspend making further supplementary payments and mandatory minimum supplements pursuant to . . . this agreement, provided that the cumulative amount of the unpaid funds by the State is greater than one-third of the total amount which was paid by the State for the calendar quarter immediately preceding the month in which the State does not make such [required] payment . . . (Emphasis added.)

This language seemingly allowed a state to delay a termination for asserted acts of noncompliance (other than nonpayment) by "requesting an opportunity to show cause." However, the article no longer specified the full disputes procedure of the "State Funding and Final Settlements" article as the method for showing cause. Presumably, a less complete and, therefore, less time-consuming "opportunity" would fulfill the article's requirements.

In these respects the 1976 agreement forms were identical. The termination article did include one additional reference to the Article VI disputes procedure but that occured merely because the revised article included more detail on how post-termination settlements were to be handled (including, finally, "If the State and the Secretary are unable to agree upon a final determination of the total liability of the State, the final determination of such liability shall be achieved through the procedures set forth in section D of Article VI"). The earlier versions of the termination article all had simply incorporated the "adjustment and settlement provisions provided for in article VI" (albeit only in cases of termination "by the State," settlement after terminations by "the Secretary" being not specifically addressed).

As noted above, however, the 1976 agreements contained, for the first time, a disputes paragraph which might itself be read as reaching out to all disputes, without need for specific cross-reference.[111] The paragraph, as revised, referred to "any matter in dispute arising under this agreement." The agreements also included a provision expressly excluding one item from the "disputes" procedure. (*See* p. 3.45 *supra.*)

B. The Types of Disputes Which Arose and How They Were, in Fact, Resolved

Because of the limited scope of the 1973 and 1974 versions of the disputes paragraph and the apparent placement of the procedure they established as the final stage in the year-end settlement process, no disputes had, by the end of 1977, gone through the full sequence of administrative appeals or even got to the stage of a final appeal to the Secretary. Nonetheless, over the three years of Federal administration of state supplementary benefits, there had been an extraordinarily high degree of disagreement between the parties over their respective compliance with the terms of the arrangement. The following sections describe several major categories of dispute which arose and how the parties, in fact, sought to resolve them.

1. Accounting Data in Support of Federal "Billings"

Being a totally unique arrangement, these agreements under which the Federal government undertook to administer state funds fit very awkwardly against general provisions of state administrative and fiscal law. During the summer of 1973, several states expressed doubts about whether the reimbursement cycle contemplated by the Social Security Administration could be accommodated under their state budget and fiscal procedures. The primary concern, at that stage, seems to have been with the short period between statement and payment. Norman Lourie of Pennsylvania, speaking at the August 24, 1973 meeting of the Committee on SSI Transition, expressed extreme reservation about a set of SSA guidelines on the "advance and adjustment of state money:"

> If you look at the time frame in terms of State procedure—every State by its fiscal law has a different set of procedures. For a department in some States to get a check out requires a procedure whereby the State budgeting system has to allow for the expenditure, and you may have an auditor general and a treasurer and go through a set of procedures . . . I do not know whether or not I can arrange a monthly payment based on Federal estimates. Can I set up such a procedure which operates on such short notice?

Once the program got underway, however, the area of tension, and ultimately dispute moved very quickly to the adequacy of supporting data provided or available to the states to explain and justify the flat Federal request, received each month, to pay so many dollars "to the Secretary." Most states have controls on the disbursement of appropriate monies by state agencies enforced by independent fiscal officials—treasurers, comptrollers and auditor generals. In some states, such officials concluded early in 1974 that the Federal billings and associated documentation furnished an inadequate basis for payments.[112]

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[111] The likely effectiveness of that language is discussed in Part 5, *infra.*

Illustrative of state controls of this sort are the sections of the State Finance Law of New York which describe the duties of the comptroller:

> §8. The comptroller shall:
>
> 1. Superintend the fiscal concerns of the state.
>
> 2. Keep, audit and state all accounts in which the state is interested, and keep accurate and proper books, showing their condition at all times . . . .
>
> 7. Audit all vouchers of any person, corporation, association, state or other public officer, department or institution, to whom or which moneys appropriated are payable, or are authorized or directed to be paid pursuant to law, before issuing his warrant for the payment thereof; and vouchers shall be required in all such cases.
>
> 8. Draw warrants on the treasury for the payment of the moneys directed by law to paid out of the treasury, but no such warrant shall be drawn unless authorized by law, and every such warrant shall refer to the law under which it is drawn.
>
> §109.
>
> 1. The comptroller shall not draw his warrant for the payment of

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[112] Had these inadequacies been foreseen, the states, no doubt, would have had far greater difficulty than they did clearing the 1973 agreements with their legal officers. A Florida Attorney General's opinion, dated November 28, 1973, which found the proposed agreement consistent with Florida law and not an unlawful delegation, assumed far more complete accountability than SSA provided through 1974 and 1975:

> [S]tate funds will not [under the agreement] be paid in advance of services rendered or goods delivered, contrary to the rule which is customarily followed by the comptroller in disbursing state funds . . . [T]he federal government, acting as the agent of the state, will disburse the state's welfare payments to the recipients at the time they are entitled to receive them and not before.
>
> As soon as the program gets under way, the comptroller will be provided with substantially the same information concerning welfare recipients as he now receives. I understand that the Department of Health and Rehabilitative Services will furnish him each month an up-to-date list of recipients of state and federal benefits, showing the disposition of state funds as to each recipient, which list will serve as the basis for the estimate of funds needed for the state's payments during the ensuing month and for the department's requisition of such funds for disbursement to the federal government for payment to the state's welfare recipients; and that the contract with the federal government will provide for an adjustment of the funds to be advanced to reflect either an over-advancement or an under-advancement of funds for a particular month. Presumably, other provisions necessary to satisfy the "bookkeeping" requirements of the comptroller and the auditor general will be included in the contract.

> any sum appropriated, except for salaries and other expenditures and appropriations, the amount of which are duly established and fixed by law, until the person demanding the same presents to him a detailed statement thereof in items and makes all reports required of him by law. If such statement is for services rendered or articles furnished, it must show when, where, to whom and under what authority they were rendered or furnished . . . . Each statement of accounts must contain a certificate by or on behalf of the party presenting the same to the effect that it is just, true and correct, that no part thereof has been paid, except as stated therein, and that the balance therein stated is actually due and owing . . . .
>
> 4. The comptroller shall not approve for payment any expenditure from any fund except upon audit of such vouchers or other documents as are necessary to insure that such payment is lawful and proper.
>
> 5. The foregoing provisions of this section shall not be construed to limit, in any manner, the right of the comptroller to demand such other proofs as he shall deem necessary.[113]

The monthly statement which SSA sent the states during the first year and more of the agreements (Form SSA-8700) presented the Federal agency's determination of the money payments to be made for the month and the cumulative disbursements (minus returns of overpayments, etc.) for the fiscal year. The information it furnished or otherwise available to the states at the time it was sent failed to satisfy the fiscal requirements of many. In addition to Form SSA-8700 the states also received the SDX case files on a monthly basis. While this presented payment information case-by-case, it could not be reconciled with the Form SSA-8700 because of the different way in which the two were prepared. The SDX system was designed to deliver certain items of information to the states to assist in their administration of programs related to SSI—Medicaid, Social Services and so forth. It was not intended to serve as support for the SSA-8700 billing and did not work well for states that sought to use it in that fashion. Recognizing its inadequacies, New York, nonetheless, used the case-by-case SDX data as the supporting material for the expenditures reported on the SSA-8700. It refused to pay those amounts on the forms which could not be reconciled with the SDX tapes. A letter dated May 15, 1975 responding to an SSA request that states "provide justification for the data they deemed minimally acceptable to substantiate billings" explained New York's position:

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[113] N.Y. State Finance Law (McKinney 1974). In New York the legislation, eventually enacted in 1974, which explicitly authorized the State Department of Social Services to "enter into an agreement with the Secretary of the federal department of health, education, and welfare" for state supplement administration, contained nothing which New York officials construed as authorizing payment to HEW without full adherence to the safeguards of the Finance Law. *See* N.Y. Social Services Law § 211 (McKinney 1976). In some other states the enabling legislation explicitly authorized payments according to the Federal agency estimate, with state fiscal control resting (as Federal officials thought it should) on an end-of-term audit. For example, the Maine statute enacted in 1974, contained a "fiscal procedures" section which reads:

> There shall be advanced with the authorization of the department, from the State Treasury to the secretary, prior to the first day of each month, an amount equal to the secretary's estimate of state supplemental benefits authorized pursuant to this Part for such month corrected for any adjustments resulting from benefits relating to any other month. The department shall conduct, at lease once each fiscal year, an audit of such benefits paid by the secretary on behalf of the state.
>
> An agreement shall specify procedures for making payments to the secretary and limitations on such payments . . . adjustments against future state payments on account of . . . recoupment, and any other fiscal and quality control provision deemed advisable by the department.

Maine Revised Statutes Annot.tit.22, § 3264 (Supp. 1975).

> According to the New York State Finance Law, payment documents must be certified for accuracy to the State Comptroller, must be supported by a detailed statement, and payment may not be made unless a detailed statement is presented to him which verifies that such money was used for appropriated purposes. Using the only available information, the State Data Exchange (SDX) does not allow the State to reconcile the Statement of Accountability [SSA-8700] to actual expenditures and liability. Reconciliation is not possible because of lack of timeliness of information, the omission of certain types of payments from the tape and no provision for a breakdown of adjustments. For these reasons, a tape containing the information listed below for each payment transaction is necessary in order to validate the Form-8700.
>
> [The list included: Identification of recipient, type of payment transaction (e.g., regular monthly payment, lump sum retroactive payment, recoupment of past overpayment), total amount broken down between state and Federal benefits, countable income, date of payment, and period to which transaction applies.]

New York's letter concluded by noting that the state was planning on continuing to take some supporting data from the SDX and that should that cease to be possible it would need more information with the statement:

> The State will use this breakdown to verify the amounts on the SSA-8700 against the SDX. It should be noted that other elements already contained in the SDX (e.g., living arrangements, supplement code, eligibility date) are also necessary for financial reconciliation. If the financial data is produced separately from the SDX, such elements must be included.

At the March 1975 meeting that prompted the New York letter, several other states expressed the view that a detailed monthly tape containing every recipient and payment amount was required for their fiscal purposes. SSA presented a plan for providing states by July, 1975 a monthly breakdown of total recipients by category (e.g., aged, blind, disabled) and by county to accompany the SSA-8700. It argued that this, along with the data available at the end of the contract period for audit, the Quality Assurance program, and the agreement provision holding SSA liable for errors "should be sufficient for essential accounting purposes." The states insisted that was not enough and "unanimously expressed a need to have the accounting data, and preferably by addition to the SDX tage, as soon as possible." SSA indicated that would take a minimum of thirteen months.

An internal memorandum prepared by Kyle McKinsey, Deputy Director of the California Health and Welfare Agency's Department of Benefit Payments, more than thirteen months later (June 16, 1976) summarized the state's experience:

> Accounting of expenditure of SSP [state supplement] funds by SSA is not satisfactory to the state. Expenditure data provided in requesting payment is not in sufficient detail for reconciliation, proper accountability and estimating. Existing contract language is quite adequate. The difficulty is in getting SSA to comply with current requirements.
>
> It would appear, from the continuing disinterest expressed by SSA, that they do not consider this issue to be of a high priority, SSA Regional Staff are in agreement with our position, but are not able to effectively back us . . . .
>
> Since the receipt of the first SSA expenditure report, DBP [Department of Benefit Payments] has had problems determining the reliability and/or validity of the date reported. The information we are requesting is essential to the maintenance of a sound fiscal system. While our needs are detailed in the federal/state contract, we have told SSA that we will accept almost anything on an interim basis. None of their promises for supplemental data have been fulfilled.

During 1974 and 1975, the problem was not limited to a failure to transmit accounting data to the states. SSA's basic accounting system was faulty; complete accounting data existed to transmit. The Report of the SSI Study Group in January 1976 concluded:

> SSA laid out its accounting requirements within the necessity to make the SSI program operational as scheduled. First priority was given to the establishment of a master record including both the converted State records and new initial Federal claims so that checks could be delivered on time to the right persons. Accounting was given a lower priority.
>
> It was apparent even before the first payment was made, and later confirmed, that the accounting system had many shortcomings and

> lacked adherence to several generally accepted accounting principles. Totals were not balanced from one part of the processing to another. Amounts certified to the Treasury Department for payment to recipients were not supported at the earliest possible point to provide a predetermined total to verify that the correct amount was certified for payment. Accurate accounting distributions were not provided for billing State agencies and charging the Federal appropriation. Accounting data were not generated for all types of actions taken.[114]

The State Auditors' Surveillance Committee, established in October 1974 to oversee the HEW audit of the first six months of Federal administration, specifically criticized the SSA-8700 statement in its final report, issued at about the same time:

> The Committee concludes from the audit reports that the 8700 report is a totally useless document. The figures contained therein cannot be substantiated by supporting documents showing payments to individual recipients. Although the individual states and the Surveillance Committee have repeatedly emphasized to SSA the necessity for adequate documentation, such documentation is not now available, nor is there any evidence that documentation will be available in the foreseeable future. This information is absolutely essential of the States are to maintain fiscal accountability over State funds as required by State statutes as well as by sound business practice.
>
> The Surveillance Committee believes the individual States would be clearly justified in insisting that SSA furnish payment tapes or other supporting documents showing payments to individual recipients to the State and insisting that future contracts with SSA provide for appropriate fiscal sanctions if SSA fails to furnish such information.

As the complaining states viewed the matter, SSA's failures in this area were failures to comply with the terms of the agreement. True, due to the states' experience efforts were made during each succeeding negotiation to provide more detailed specification of the Federal agency's obligation; but from the states' vantage point this was seen as an area of noncompliance rather than seriously inadequate contract coverage.[115]

The 1974 Model Agreements, for example, which were in force during most of the critical period, provided in Article II (''Functions to Be Performed by the Secretary''):

> The Secretary shall: . . .
>
> D. Maintain records of individuals eligible for and receiving State supplementary payments or mandatory minimum supplements.

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[114] *SSI Study Group Report* 127–28.

[115] *See* the California memorandum quoted at p. 142 *supra,* which expresses this view.

F. Receive, disburse, and account to the State for State funds in making such supplementary payments and mandatory minimum supplements and furnish the State periodic fiscal reports thereon, not less frequently than monthly.

Neither the agreement or other source, however, furnished a state a ready forum in which to establish the claim that the Federal agency was not supplying accounting data to meet the agreement's requirements. The "disputes" paragraph of Article VI with its apparent tie to year-end fiscal settlements offered no clear relief. The agreement established no explicit penalties which the state might invoke, turning the matter in a question of liability which might ultimately be run through the disputes procedure.[116]

What states did, on the basis of diverse theories of legal justification, was to pay less than all of the amount requested by the Federal agency on the Form SSA-8700. As already noted, this was New York's approach. Arguing that its state finance law would only allow payment of amounts that could be supported, New York paid just those portions of the total on the Form SSA-8700 that could, according to state calculations, be related to the SDX tape.

Failure to furnish accounting data to support the Form SSA-8700 was not the only ground on which states refused to pay portions of the amount requested during 1974 and 1975, but even when other justifications were invoked (such as, the high level of Federal errors) the lack of reconcilable accounting data counted as an important additional factor.[117]

2. *Timely State Payment*

As of August 1975 states had withheld $237 million of the total billed for state supplement payments on the Form SSA-8700. A year later the situation has improved slightly and the amount outstanding had dropped to approximately $120 million.[118] Later adjusted Federal calculations of the amount of unreimbursed expenditures produced much lower figures

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[116] During the 1976 negotiations, the states sought but failed to achieve either a provision that would establish a financial incentive for furnishing more adequate accounting data or a term conditioning the state's payment obligation on its receipt of adequate supporting documentation.

[117] For a while during 1976, Washington withheld $100,000 per month against SSA's monthly statement on the ground that the agency was "knowingly requesting an amount each month to cover their high rate of erroneous payments." The state based this assumption on: "The excessively high error rate (nearly one-third of all payments) displayed in the audit, their unwillingness to get down to decision making on the audit settlement, the presence of evidence that a high rate of errors were continuing, and, at the time, their failure to present a workable contract for continued Federal administration." Washington maintained that it was not, despite such withholding, "in violation of the contract for Federal administration."

[118] *Staff of Senate Committee on Finance, 95th Cong., 1st Sess., The Supplemental Security Income Program* 88 (1977).

(without even getting to the question of offsetting Federal liability for erroneous payments).[119]

The HEW budget justification for Fiscal Year 1977, thus, put the amount of unreimbursed Federal expenditures for fiscal year 1974 and 1975 at approximately $60 million and reported only $30 million for the first six months of fiscal year 1976.[120] A year later (in March 1977) the agency reported:

> The amount of reimbursement withheld by States for fiscal years 1974 and 1975 is about $59.6 million. The reimbursement deficit for FY 1976 is about $27.5 million, most of which was withheld during the first half of the year. During the last half of fiscal year 1976 and the transition quarter States not only reimbursed SSA in full for current obligations, but some States repaid parts of the prior years' deficits. We attribute this change in position by States to the following factors:
>
> —States are aware of SSA's intensified efforts to improve SSI payment accuracy.
>
> —As negotiations for FFL [Federal fiscal liability for errors] for the first 6 months of the program drew closer, States were reassured of Federal intentions to deal fairly.[121]

By April of 1978, the situation had improved further:

> During the last half of 1976, States began reimbursing SSA timely for current State supplementation obligations. Generally this practice has continued through the present time. SSA began recovery of the reimbursement deficit in 1977 by offsetting its FFL settlements with appropriate States against the reimbursement they owe the Federal government. This method of recovery reduced the reimbursement deficit from about $87.1 million at the beginning of 1977 to about $68.4 million at the end of the year.[122]

The original Model Agreements did not spell out SSA's recourse when confronted by a state failure to make timely and complete payments of the amounts billed. The only path clearly traced in the agreement was termination for noncompliance under Article XI, which arguably permitted a State to forestall termination until after exhaustion of the disputes procedure of Article VI. The agency could also, of course, terminate by serving the 120 written notice thereby avoiding the issue of compliance. No doubt the agency might have asserted (as the states, in effect, were) that its performance was contingent on timely performance by the states and ceased making payments beyond the amounts paid by the states. (Under Federal law the authority for the agency to continue making payments under those circumstances was far from clear.)

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[119] The issue was not a straight-forward one, particularly, in the case of states subject to "hold harmless" protection. In the case of two states, California and New York, there were initially significant differences between the Adjusted Payment Levels calculated by the states and those estimated by SSA leading to substantial differences of opinion as to the state share of Federal expenditures.

[120] *Departments of Labor and Health, Education and Welfare Appropriations for 1977, Hearings Before a Subcomm. of the House Comm. on Appropriations,* 94th Cong., 2d Sess., Part 6, at 357 (1976).

[121] *Departments of Labor and Health, Education and Welfare Appropriations for 1978, Hearings Before a Subcomm. of the House Comm. on Appropriations,* 95th Cong., 1stSess., Part 6, at 381 (1977).

[122] *Departments of Labor and Health, Education and Welfare Appropriations for 1979, Hearings Before a Subcomm. of the House Comm. on Appropriations,* 95th Cong., 2d Sess., Part 6, at 343 (1978).

The 1974 Model Agreement, responding to the first six months experience, addressed these matters. Under its terms, as noted in section A(2) *supra,* a state was merely entitled to an opportunity "to show cause" why the agreement should not be terminated for noncompliance if SSA took that route. More importantly, a state's failure to make timely payments expressly authorized the Secretary to "immediately suspend making further" payments, provided that the cumulative amount of unreimbursed funds exceeded roughly one month's obligation.

SSA never used these measures. It tolerated state withholding. SSI appropriations were used to cover the gap between expenditures and state reimbursement with a full disclosure to Congress during annual appropriation hearings. Thus, SSA budget justification for 1977 stated:

> SSA again wants to bring to the attention of the Congress that it is using the SSI appropriation to cover shortfalls in State reimbursement of supplemental payments made on their behalf. This was first pointed out to the Congress in the justification of the 1975 supplemental appropriation request for the SSI program.[123]

Similar language appeared in the justification for 1978, followed by this projection for the future:

> Although generally states have reimbursed SSA for these reimbursable obligations over the past several months, there have been some instances where States have delayed reimbursement. For example, California in the first three months of FY 1977 [during which there was no executed agreement] did not reimburse SSA until the FY 1977 agreements were completely negotiated and agreed upon by both parties. Experience has shown that use of the appropriation for this purpose is diminishing but may continue for awhile.[124]

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[123] *Departments of Labor and Health, Education and Welfare Appropriations for 1977, Hearings Before a Subcomm. of the House Comm. on Appropriations,* 94th Cong., 2d Sess., Part 6, at 357 (1976).

[124] *Departments of Labor and Health, Education and Welfare Appropriations for 1978, Hearings Before a Subcomm. of the House Comm. on Appropriations,* 95th Cong., 2d Sess., Part 6, at 382 (1978).

3. *Audit Rights*

Their displeasure with the quality of the accounting data furnished by SSA and evidence of a very high rate of Federal error led states to be particularly eager to exercise their audit rights under Article IV, upon completion of the first agreement period (January 1 through June 30, 1974.) The provisions of Article IX required case-by-case identification of errors before liability would shift to the Federal government. The states were liable, subject to "hold harmless," for all payments other than "erroneous payments . . . identified on an individual basis." That, the article said, meant "identified or discovered during the quality assurance review or reported by the State in writing and verified by the Secretary."

The Federal agency quickly concluded, however, that it did not relish the notion of auditors representing 31 states (the number with agreements for that period) going over its SSI records. Pointing to the provision in the audit article that required mutual agreement "upon a satisfactory audit arrangement," SSA indicated it would not accept any individual state audit request prior to completion of an audit of that first six month period which the HEW Audit Agency would undertake. What followed is described in the Report of the Supplemental Security Income Study Group:

> The Audit Agency regarded the audit as an appropriate undertaking. The basic function of the agency is to evaluate ongoing programs, reviewing their operations and detecting areas of weakness which need improvement. These audits are made on a one-time or on a periodic basis for benefit of management. They are not made on a continuing basis to meet program needs. As it turned out, the review of SSI during fiscal year 1975 required 115 man years at a cost of $4,057,000. This represented approximately 12 to 15 percent of the Audit Agency resources. The National Intergovernmental Audit Forum, composed of audit executives from Federal, State, and local governments, agreed to select a committee [the SSI Surveillance Committee] to oversee the Audit Agency's role and help solve any auditing problems between the States and SSA. . . .
>
> SSA, regarding the audit as a *State* audit, neither offered nor sought to discuss the audit guidelines with the Audit Agency although it did inform the Agency about the quality assurance system and its methodology. Neither the Audit Agency nor SSA was aware of the extent of the differences in the quality assurance [measurement of errors which began during the second half of 1974] and Audit Agency approaches and the significant ramifications this would cause. The lack of consultation between the two agencies also left vague how the audit findings were to be used in settling Federal fiscal liability.[125]

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[125] *SSI Study Group Report* 124–25.

SSA did not maintain that states would be bound by the findings of the audit. Any state would, the agency said, be free "to arrange for additional or expanded audit on its own behalf and at its own expense", if it chose, after the HEW audit was complete. Moreover, HEW promised that each of the 31 states involved would be given the opportunity of having one of its own auditors "participate directly in the conduct of that portion of the [HEW] relating to such State." Many utilized that opportunity. The HEW audit was to be performed and the final report furnished at no cost to the individual states.

HEW's audit of the first six months of 1976 took much longer than anticipated. The majority of the final audit reports were not released until March 1976. However, state misgivings about the objectivity of the HEW agency were, during that time, relieved. In its final report to the states, the seven member Surveillance Committee wrote:

> Through the course of this audit, the Committee has been favorably impressed by the overall quality of the audit work performed by HEWAA. Initial concerns voiced by some States as to the independence and credibility of HEWAA were dispelled to the satisfaction of the Committee as the audit progressed. The Committee recognizes the difficulties inherent in an audit of this magnitude and complexity. We complement HEWAA for its professional and proficient conduct of the audit.

Between the HEW agency's audit and the quality assurance system which produced measurements of error for the succeeding period, the states were clear which they had greater confidence in. In July 1975 the SSI Surveillance Committee voted unanimously to request HEW to have the Audit Agency undertake for fiscal year 1975 a "fiscal audit," subject to independent surveillance, similar to "the first audit." This position was restated in the committee's final report with the acknowledgment that "to date, HEW has not agreed to the Committee's request."

HEW firmly resisted efforts to secure agreement modifications which would remove the quality assurance findings as the basis for negotiating Federal fiscal liability for errors during the second half of fiscal year 1975. It also refused to provide an HEW Audit Agency audit of Federal-state liability covering any part of that fiscal year, including the first half which, like the six months of fiscal year 1974, was to have FFL determined on an individual basis.

Even the HEWAA audit reports for fiscal year 1974 did not permit case-by-case identification of error as the agreements seemed to require. The audit, as each individual report, explained: "Was made in accordance with standards for governmental auditing. The objective of the audit was to ascertain whether the SSI payments made between January 1, 1974 and June 30, 1974, were properly determined and whether the liability for payments was accurately divided between the State of ——— and the Federal government. . . . " It used a sample of case files of individuals with payment records during the six month period and projected the mean of the errors found in that sample and the sample standard deviation to the full universe of cases. Because the agreement terms caused liability for errors to hinge on whether or not they were caused by state errors in furnishing data during the conversion process, the audit necessarily assigned the cause for errors, where possible, to the state or SSA. Because of the accounting problems already discussed and sampling, all state audits found a certain amount of "unlocated difference" between the adjusted totals from the Form SSA-8700 and the liability calculated from the case files. "In the 31 Federally administered States [the agency] found that the amount of the unlocated difference ranged from 1 to 6 percent of the total reported payment."

The agency recommended to both the individual states and HEW that its "audit results" be used "to negotiate settlement of liability for the six-month period ending June 30, 1974."

Upon issuance of its final report in 1976, the SSI Surveillance Committee disbanded. It was succeeded by a State Audit Committee, similarly comprised of state audit officials. That group had no more success than its predecessor in obtaining an HEW audit of fiscal year 1975 state liability. It did, however, establish a cooperative working relationship with the HEW Audit Agency, which undertook, in 1976, "a two-phase indepth audit of . . . SSI program practices and procedures." While not a state-by-state audit, it covered fiscal year 1975. HEW "invited [the states] to participate in these two audits in order to satisfy their right to audit." SSA noted that:

> A successor to the SSI Surveillance Committee is being formed [the SSI State Audit Committee] to work with HEW in the conduct of the audit. Should States desire audit rights beyond this, they will have to be negotiated with SSA under the terms of the agreement which requires that any such State audit must be mutually worked out with both parties.

The SSI State Audit Committee negotiated a memorandum of understanding with the HEW Audit Agency which offered access to the latter's audits of the central office, the SSA's quality assurance system, and district offices. In return the Committee recommended that the states share with the Federal agency any audits they performed for fiscal year 1975. (This understanding was subsequently incorporated in the 1976 Model Agreements. *See* p. 3.39 *supra*). The Committee also undertook to aid states which desired to perform audits for fiscal years 1975 and 1976 in a variety of ways.

A July 1977 summary of the Committee's accomplishments listed the following:

—Provided an audit plan for States who wished to perform audits of fiscal years 1975 and 1976

—Devised a sample plan and oversaw pulling of the sample

—Prepared a work program for conducting an audit and provided the necessary tools for performing an audit for States who were interested

—Devised a sample plan for fiscal year 1976

—Represented the participating States in resolving many issues with the Social Security Administration

Even with the assistance of the committee and the cooperation of the HEW Audit Agency, some states attempting audits experienced difficulty. It was reported in July 1977 that:

> [A]udits [were] under way for California, Massachusetts, New York, Tennessee, and Washington; difficulties are being experienced in some of these States in getting case folders, and in some instances auditors were reporting that folders when received were found to have been screened and data removed. Michigan and Rhode Island had not yet received the case folders requested; Arkansas and Georgia had not yet started; and Nevada had decided not to continue.

The lengthening time between any possible state audits and the periods to be reviewed raised a potential problem of record retention. The SSI Audit Committee raised this issue with SSA officials in 1977 and secured a commitment that the latter would retain the tapes with accounting data, which had not already been sent the states, "for a minimum of 3 years or until any audits started in that 3-year period are completed."

4. *Year-End Liability*

a. Erroneous Payments

Since negotiations looking toward final settlement of liability for the program's first six months—January 1, 1974 through June 30, 1974—had to await completion of the audit, those negotiations did not get underway until the winter of 1976. (Original hopes had been for completion of the audit mid-way through 1975 with settlement occurring shortly thereafter). Shortly before release of the final audit reports, SSA presented a proposal for achieving fiscal settlements for fiscal year 1974, together with its position on subsequent years. That proposal included the following general propositions:

> A. Fiscal Year 1974: SSA will be willing to agree with the States to modify the State supplementation agreement to accept Federal fiscal liability (FFL) for overpayments or payments to ineligibles for fiscal year 1974, based on the results of the HEW audit conducted on behalf of the 31 federally administered States subject to certain adjustments . . . . Any State that prefers adhering to the provisions of the fiscal year 1974 agreements may opt to have Federal liability computed on a case-by-case basis rather than using the audit.

> B. Fiscal Year 1975: It is SSA's intent to comply with the FFL language of the fiscal year 1975 agreement. The first 6-month liability will be on a case-by-case basis. The second 6 months will be the first liability period in which the QA/FFL system will be fully operative. In any State in which the first stepdown tolerance limit was not reached liability will be assessed according to the QA findings.
>
> C. Fiscal Year 1976: The QA/FFL system is operative, according to the terms of our Federal/State agreement, for the entire period.

While the states found settlement on the basis of the HEW audit reports attractive, they objected strongly to several of the "adjustments" that SSA proposed be made to the audit findings when using them to calculate final liability.

A major point of contention, for example, was SSA's insistence that since the audit of a sample projected to the whole was being substituted for a system which required states to identify errors case-by-case some "tolerance" level should be subtracted from the audit figure. It presented this position as follows:

> The case-by-case liability language in the agreement was not based on the premise that SSA would be liable for all errors made in the first 6 months of the program. To project liability from a sample audit would make us liable for all errors projected and with less than adequate reliability based on the variability of the sample in some instances. In order to comply with the spirit of the agreement and be consistent with the ongoing FFL program in which there is an ongoing tolerance of 3 percent for ineligible cases and 5 percent for overpaid cases, it is our intent to apply such a tolerance to the audit findings when used for fiscal year 1974 fiscal settlement. Since there was not a full QA system operative in the January through June 1974 period, we intend to use the QA findings for the second 6 months (July through December) to establish the error rate against which the tolerance will be applied in order to determine the proportion of overpayments determined by the audit for which SSA will be liable for fiscal year 1974. Example: The composite tolerance is 8 percent (3 percent ineligible, 5 percent overpaid). If in a particular State the composite QA error rate for overpayments and payments to ineligibles for July through December 1974 was 24 percent, the tolerance used for settlement can be expressed as 8/24 or one-third. This means that the Federal Government would be liable for two-thirds of the Federal liability projected from the HEW audit for fiscal year 1974.

Other disputed "adjustments" included treatment of the "unlocated difference" between audit projections and the totals from the SSA-8700 financial accountability reports and treatment of division of errors for "hold harmless" states.

The APWA/SSA Liaison Committee established an Ad Hoc Subcommittee on Fiscal Settlements to consider the SSA proposal and to recommend a unified state response. That subcommittee, at a meeting held on March 31, 1976, voted to recommend rejection of the SSA proposed adjustments, while asking for continuing negotiation on the basis of the HEW audit findings—"the best, and for many States the only reliable body of fiscal information presently available." While expressing a willingness "to consider some other, more appropriate, method for giving recognition to a 'tolerance' concept," the subcommittee condemned SSA's proposed formula:

> In fact, this adjustment, although [in SSA's example] referred to as an "8% tolerance" (as derived from the 5%/3% formula for AFDC which is still in litigation) is not really 8 percent, but rather represents a proposed ratio of the "8 percent tolerance" to the base period "error rate" reported by SSA's QA study for the succeeding 6-month period, i.e., July–December 1974.
>
> In the [example furnished] this method results in a [33] percent reduction in Federal Liability and is based on the illogical application of Quality Assurance data from a different 6-month period from that under consideration.

The National Council of State Public Welfare Administrators, meeting in April 1976, affirmed the subcommittee's position.

In early August 1976, the subcommittee met again with SSA representatives. At that time a somewhat different "settlement proposal" was described by Federal representatives. The principal feature of this second SSA proposal was its substitution of an offset equal to the erroneous Federal SSI payments caused by state errors during conversion (based upon the findings of the HEW Audit Agency) for the controversial "tolerance level" adjustment.

The subcommittee requested that SSA submit the proposal in written form with illustrative material. When received, that document was circulated to the 31 states involved along with some comments prepared for the subcommittee's chairman, Sumner Hoisington, Deputy Commissioner of the Massachusetts Department of Public Welfare. On the subcommittee's behalf, the covering memorandum, dated October 14, 1976, requested that states provide the following information:

1. Is the original "Settlement Proposal" . . . acceptable to your State?
2. Is the alternate "Settlement Proposal" . . . acceptable to your State?
3. If your responses to 1 and 2 are both negative, does your State plan to claim fiscal settlement on a "case-by-case" basis as provided in the original Agreement?

4. If your responses to 1, 2, and 3 are all negative, what other plan or formula do you suggest should be sought by the Subcommittee?

By early December (three weeks after the deadline set by the inquiry) 22 of 31 states had responded. The answers indicated the following:

> —only four States (Kansas, New Jersey, South Dakota, and Wyoming) [found] Settlement Proposal #1 acceptable, and for the last two the only acceptable [was] conditional
>
> —only four States (Kansas, Iowa, Massachusetts and New York) would consider Settlement Proposal #2 but subject to certain conditions
>
> —only two States (Montana and South Carolina) [indicated] an immediate readiness and preference for a case-by-case settlement
>
> —the preponderance [was] for settlement based directly on the conclusions reached by the HEW Audit Agency, with further negotiations as to the interpretation of "State-caused error" and as to a reasonable tolerance allowance for Federal error not related to the . . . AFDC formula.

Several states took specific exception to the offset contained in Proposal #2. For example, Michigan wrote:

> The second federal formula, which would apply a tolerance of error equal to the state caused federal overpayments, was . . . advanced by SSA simply as an alternative to the first approach which the states had clearly rejected. The implied justification in this approach is that shared errors imply shared liability. We disagree with this argument.
>
> The Social Security Administration, in order to expedite the implementation of the SSI program, decided to rely on conversion information provided by the states. Contracts to provide that information were developed. These contracts nowhere established any liability for errors in state supplied information. Had SSA wished to avoid any errors in state initiated information they could have developed each conversion case anew using their own staff, etc. It is our position that SSA wished to "purchase" our information including any errors not rectified during the conversion process and that, having chosen to rely on the information we provided, they have no contractual or other justification for assigning liability for errors to the state.

And Maine added:

> [T]here [should] be acceptance by SSA of the fact that they invited all of the errors by essentially assuring States that if we would give them whatever information we had, they would "correct and purify" it; we were assured that they had the capability of doing this. It obviously was a blatant, gross over-statement of crass naivete, but we, at the State level, should not be held responsible now for such oversimplification.

Both settlement proposals accepted the HEW Audit Agency's allocation of errors between those which were "caused by" the state and those which were the responsibility of the Federal agency. As to supplementary payments, the FFL provisions of the agreement required the separation. Its importance was, of course, magnified by Proposal #2. Several of the states disputed the way HEWAA had performed the allocation. For example, Indiana's reply to the subcommittee inquiry stated:

> Our rejection of [the] second proposal is based on the inability Indiana had in accepting the findings of the HEW Audit Agency in which apparent arbitrary assumptions were made by that Agency as to what constituted State caused errors. An example of this would be those cases in which the recipients were residents of County Homes at the time of conversion. Indiana raised the question as to whether such individuals were eligible for conversion during the conversion process and was advised by the Regional Office of the Bureau of Supplemental Security Income to proceed in converting them. However, the blame for federal and state payments issued to [these] ineligibles was subsequently placed on the state. It is also necessary to note that during the six-month period for which the audit was completed . . . and for several months after that period there were no available means by which the County Departments of Public Welfare could report detected errors in conversion data or changes that occurred after January 1, 1974 to Social Security Administration District Offices due to the fact that the use of Form SSA-8820, SSA State SSI Information Exchange, was not implemented until the latter part of 1974. There was also limited cooperation on the part of the Social Security Administration in processing data submitted on the form this Department had developed specifically for communicating such data to the servicing District Offices.

The Ad Hoc Subcommittee on Fiscal Settlements subsequently prepared two new settlement proposals which it saw as offering a compromise, being based on SSA's Proposal #2 but modified "along lines suggested by the States' comments." SSA did not accept the major features of these counterproposals, but in April of 1977 issued slightly refined versions of its Proposals #1 and #2. Each state was presented with settlement calculations employing both formulae and was offered whichever proved more advantageous. (Proposal #2 tended to be more attractive to large supplement states, e.g., Massachusetts, while #1 was the more palatable to low level supplement states).

As of September 14, 1977, Irving Engelman reported the following settlement situation for fiscal year 1974:

> 21 States have indicated willingness to accept the higher of the offered amounts;

3 States (Michigan, Montana, and Utah) have informed SSA that they will proceed to establish their claims on a case-by-case basis;

7 States (California, Florida, Georgia, Ohio, Pennsylvania, Rhode Island, and South Carolina) have indicated no willingness to accept the settlement offer, nor to proceed with a case-by-case claim, but are engaging in continuing negotiation with SSA.[126]

Fiscal year 1975 settlements, with the agreement stipulating resolution of Federal fiscal liability on the basis of case-by-case identification for the first half and by use of the Quality Assurance system for the second, still lay ahead. Without an HEW Audit Agency report no uniform method of resolution seemed possible.[127]

Fiscal year 1976 and succeeding years, however, for which FFL rested totally on the results of the Quality Assurance system provided a much clearer basis for settlement without the need for audit or lengthy post-term review.

While full settlement of the first six months of 1974 had still not been achieved by April 1978, the HEW budget justification of that date reported full settlement of FFL for January-December 1975.[128]

b. "Hold Harmless"

The "hold harmless" formula as interpreted by HEW, turned out to limit state supplement liability for six states through Fiscal Year 1976: California, Hawaii, Massachusetts, Nevada, New York, and Wisconsin. Under the agreements with those and other potential "hold harmless" states, an additional possible area of dispute was present—calculation of the "hold harmless" amount. The calculation rested on a very troublesome measurement, the state's "adjusted payment level (APL)." The original agreements set provisional "adjustment payment levels," providing for audit and adjustment as part of the fiscal year 1974 final settlement. Concern about the accuracy of APL calculations based on a sample of cases, led SSA to request five states to recalculate their APLs based on a review of all the appropriate cases. The agency entered into Adjusted Payment Level agreements with the affected states which spelled out in somewhat greater detail

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[125] *SSI Study Group Report* 124–25.

[126] As of October 16, 1978, 24 states had accepted SSA's settlement offer; four states had initiated the disputes process or were about to (Florida, Ohio, Pennsylvania, and Utah), Montana had submitted asserted errors on a case-by-case basis, and two states were still negotiating (California and Nevada).

[127] In September of 1978, SSA offered the states an alternative to use of case-by-case data for July-December 1974. The settlement offer made use of the Quality Assurance data for that base period.

[128] *Departments of Labor and Health, Education and Welfare Appropriations for 1979, Hearing Before a Subcomm. of House Comm. on Appropriations,* 95th Cong., 2d Sess. 342 (1978).

the process for reaching agreement on a final adjusted payment level (APL). Those agreements provided for a state calculation of the APL according to specified guidelines, a Federal audit of the state determination, followed by negotiation, with submission of any unresolved issues to the basic agreement's disputes procedure. By March of 1976, all but two states had complied and had reached agreement with SSA on "final" APLs.[129]

In the case of one of those states, California, negotiation of a final APL produced an impasse which the state finally attempted to resolve through the disputes procedure laid out in the agreement. On June 20, 1976, California submitted a request for a determination under Article VI, D on the issue which it said arose out of SSA's "failure to accept and implement the Adjusted Payment Levels (APL) as redetermined by the survey we conducted according to the Agreement for Determining Adjusted Payment Level Redetermination, dated February 11, 1975."

Ten days earlier California had submitted a separate "hold harmless" dispute, raising essentially a single-point of statutory interpretation having to do, not with the APL, but another element of the "hold harmless" equation. The SSA regional office, on the basis of an opinion by HEW General Counsel's Office, had held to the position that in calculating the difference between the APL and SSI benefits plus countable income, as required by the statute (the amount of so-called "protected payments"), the 1/3 reduction in benefits which applied in lieu of an actual reduction according to the value of in-kind income to those living in the household of another should be treated as countable income. California maintained that benefit reduction was not income. The state position yielded higher "protected payments" and therefore a larger "hold harmless" amount.

A letter dated December 6, 1976, signed by Robert P. Bynum, Associate Commissioner for Program Operations of SSA rejected this "hold harmless" claim. The letter indicated: "This decision is the initial determination referred to in the disputes clause of our agreement dated July 12, 1974, for the period from July 1, 1974, to the present, at paragraph D of article VI." It noted that under the agreement California had 30 days to request a reconsideration from the Commissioner. The state did so on January 5, 1977, asserting that its appeal related to the agreement for the first six months of 1974 as well, and should, therefore, be considered filed under its disputes procedure, too. The appeal was denied by SSA on July 7, 1978. In October 1978, California filed an appeal with the HEW Departmental Grant Appeals Board.

5. *Reimbursement of State Administrative Costs*

The extent of Federal reimbursement for state administrative expenses was a growing area of tension between the parties. This not only influenced successive revisions of the Model Agreements, but was reflected in disputes as to past periods. Such disputes were, under the terms of Article VIII of the Model Agreements, subject to the disputes procedure of Article VI. At least one state, California, made use of that procedure. By a letter dated July 2, 1976, the state appealed the following issue:

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[129] The five states required to recalculate their APL included three of the six ultimately benefitting from "hold harmless" (California, New York, and Wisconsin) and two others (Michigan and New Jersey).

> In April 1975 the Social Security Administration notified California that as of July 1, 1975 it would no longer reimburse the administrative costs incurred by counties in responding to SSA District Office inquiries unless the inquiry fell within one of seven specified categories. This arbitrary restriction has created an ongoing dispute between this Department and the Social Security Administration. Since we are unable to agree on this item of dispute, we are requesting that you designate an official to make a determination of this issue and inform us of your decision pursuant to Article IV-D of the current SSI/SSP contract between California and the Secretary of Health, Education, and Welfare.
>
> It is the Department's position that SSA is bound by the SSI/SSP contract to provide funding for any work the county welfare department does at SSA District Office request.

That particular issue was later resolved by SSA in the state's favor; but in September 1976, the state appealed several other administrative cost issues. That request for a determination was not even acknowledged by SSA until March 29, 1977.

In addition to disputes about specific items for reimbursement, delays in reimbursement also generated state concern. In March 1976, California protested that for fiscal year 1976 claims were being dealt with "only on a total claim basis after the entire claim has been monitored and approved." In a letter to SSA Commissioner Cardwell the state suggested a procedure for separating out the agree-upon reimbursable items from those under dispute. The letter concluded:

> Failure in the effort above will leave us no other course but to consider litigation against the Social Security Administration for more timely and reasonable payment of state and county expenditures for administration of the SSI/SSP Program in behalf of the Federal Government.

6. *Adequate Treatment of Applicants and Recipients*

The difficulties experienced by SSA during SSI's start-up produced not only payments to ineligibles and excessive payments, but also enormous delays in making eligibility determinations and issuing payments. There were as well significant underpayments. These were not matters which bore directly on Federal liability under the agreements, thus feeding through the settlement and disputes process. They did, however, affect the states, not simply as they might feel injury vicariously through their needy citizens but in a direct fiscal sense. Many states were obliged to respond to the needs created by SSA's administrative deficiencies with state and locally funded assistance payments. By late 1974 the Interim Assistance legislation[130] (42 U.S.C. § 1383 (g) (Supp. V 1975) provided the states partial though not complete protection.

The Model Agreements assured (as the stature and regulations did not) that SSA's administration of state benefits included a commitment to:

> Provide individuals reasonable notice and opportunity for a hearing with respect to any adverse decisions as to the rights of such individuals to receive such supplementary payments or mandatory minimum supplements.

The agreements did not, however, establish a clear route for resolution of any state claims that the Federal agency was failing to furnish recipients with timely and accurate payments or otherwise meet their needs as required by the agreement. Was SSA, for example, required to furnish bilingual administration in areas with large non-English speaking populations? Such issues had no certain way of getting formal attention under the agreement. In cases of asserted state noncompliance, the agreement terms expressly granted the Federal agency a right to terminate. And under the original agreement, though not subsequent versions, Federal termination for noncompliance could be appealed under the disputes procedure. States, however, were not expressly granted a comparable right, so not even that generally unappealing mechanism was available to them in such cases.

PART 5. THE LEGAL SETTING INTO WHICH THE SSI AGREEMENTS FIT— PROCEDURAL STANDARDS AND OPPORTUNITIES FOR JUDICIAL REVIEW

Any detailed appraisal of the procedures employed by the Social Security Administration in establishing the terms for Federal administration agreements with the states and in resolving disputes subsequently arising must begin with a general understanding of the legal setting into which these agreements fit. Since the Social Security Act provisions themselves furnish so little guidance on these matters (*see* Part 2-A), that setting is defined almost totally by other Federal statutes and court decisions interpreting them. Any legal standards pertinent to SSA's procedures and opportunity for judicial review of its actions must derive from sources outside the Social Security Act.

This part, therefore explores the applicability to the SSI Federal-state agreements of such statutes as the Federal Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.;* the Wunderlich Act, 41 U.S.C. §§ 321-22 and others concerning Federal government contracts; and finally those setting the jurisdiction of the Federal courts. Because of the novelty of the agreements and the total lack, at this early point, of judicial opinion on these issues, the treatment is necessarily speculative.

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[130] 42 U.S.C. § 1383 (g) (Supp. V 1975).

A. Agreement Formation

1. The Federal Administrative Procedure Act

When the Social Security Administration issued Model Agreements in 1973 and issued revised Model Agreements in 1974 and 1976, it was engaged in "rule making"—a form of agency decision-making both defined and regulated by the Federal Administrative Procedure Act (APA). The APA defines "rule making" as an "agency process for formulating, amending, or repealing a rule."[131] "Rule" is, in turn, defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ."[132] Surely, a document setting forth the basic terms and conditions on which SSA will execute an agreement, authorized by statute, with states desiring Federal administration of state benefits falls within the scope of that definition.

Various procedural requirements for Federal agency "rule making" are laid down by the APA. The most detailed requirements appear in section 4:

> (b) General notice of proposed rule making shall be published in the Federal Register . . . . The notice shall include—
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> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rule adopted a concise general statement of their basis and purpose.[133]

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[131] 5 U.S.C. § 551(5) (1976).

[132] 5 U.S.C. § 551(4) (1976).

[133] 5 U.S.C. § 553 (1976).

Section 3 requires publication in the Federal Register of all "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."[134]

While SSA did attempt to issue SSI regulations which complied with these requirements during 1973, including some dealing with the Federal-state administration agreements, most of the critical terms of the agreements were not covered by such regulations.[135] And the Model Agreements of 1973, 1974, and 1976 were issued without compliance with the full procedural demands of APA sections 3 and 4. Justification for the more informal process used by SSA must derive from one or more of the exceptions also contained in those sections.

a. Rule Making "Relating to . . . Public . . . Contracts"

Section 4 totally excepts from the APA's procedural requirements for agency rule making: "a matter relating to agency management or personnel, or to public property, loans, grants, benefits, or contracts."[136] That exception covers HEW's regulations setting requirements for state welfare programs supported by Federal grants-in-aid, on the one hand.[137] It also applies to the promulgation of regulations and standard contract clauses for government procurement.[138] It would appear to apply to the SSI Federal-state agreements.

Recommendation No. 16 of the Administrative Conference of the U.S.

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[134] 5 U.S.C. § 552(a)(1)(D) (1976).

[135] *See* Part 3-A(5) *supra.*

[136] 5 U.S.C. § 553(a)(2) (1976).

[137] Rodriguez v. Swank, 318 F. Supp. 289 (N.D. Ill. 1970), *aff'd mem.* 403 U.S. 901 (1971).

[138] "This permits, in theory and in practice, ex parte development of contract clauses . . . . There is thus no opportunity for any public comment or objection prior to the time clauses are implemented or selection standards adopted, except in the unusual case that the agency chooses to establish such procedures itself." Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process,* 1974 *Wis. L. Rev.* 301, 315.

Current agency practices were described by the Commission on Government Procurement as follows:

> Some agencies never solicit comment from industry [those most directly affected]; some do so occasionally; others, like DOD [Defense] and to a lesser extent GSA, do so fairly regularly, but even they solicit comment from selected industry, professional, and institutional associations, and do not publish proposed regulations in the *Federal Register* for the benefit of individual contractors and the public. Agencies sometimes make exceptions in cases seriously affecting contractors, frequently solicit comment too late to be fully effective, and provide little or no rationale for proposed or adopted changes or for rejecting industry recommendations.

1 *Report of the Commission on Government Procurement* 39 (1972) [hereinafter cited as *Procurement Commission Report*].

(No. 69-8 under the present numbering system) urged removal of that portion of the section (a)(2) exemption covering "public property, loans, grants, benefits, or contracts."[139] It reasoned that cases where exemption was truly warranted could be dealt with through section 4 (b)(B) which permits agencies to omit the notice and comment procedure of sec. 4 (a) in cases where they: "for good cause [find] (and [incorporate] the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." To date, Congress has failed to pass any of the numerous bills which have been submitted to implement that recommendation.[140] The chances of complete Congressional acceptance were reduced in 1972 when the Commission on Government Procurement failed to endorse the Administrative Conference recommendation, at least as to "procurement contracts," because of fears about "unduly burdening the procurement process with APA-type rule making procedures" and "the potential [for delay of] procurement actions by litigation over whether an agency complied with rulemaking requirements."[141] The Commission did, however, recommend the establishment of "criteria and procedures for an effective method of soliciting the viewpoints of interested parties in the development of procurement regulations,"[142] recognizing the vital importance of "giving contractors and other interested parties an opportunity to comment on proposed procurement regulations during their development."[143] (In speaking of procurement regulations both the Administrative Conference and Commission on Government Procurement were, of course, addressing not only agency rules that prescribe the procedures for entering procurement contracts but also those promulgating standard clauses for use in them.)

The 1969 Administrative Conference Recommendation did not place total reliance on legislative reform, but concluded by calling for voluntary agency compliance with APA rulemaking procedures in the area of "public property, loans, grants, benefits, or contracts."[144] Several agencies, though none of the major procuring agencies (Defense, NASA, GSA, or AEC), adopted policies implementing that recommendation.[145] Significantly HEW was one of the agencies to do so. In January 1971, the Department's Assistant Secretary for Administration issued the following statement, subsequently published in the *Federal Register:*

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[139] 1 *Recommendations and Reports of the Administrative Conference of the United States* 29 (1970).

[140] *See, e.g.* S. 1421, 93d Cong., 1st Sess. (1972), and H.R. 6223, 93d Cong., 1st Sess. (1973).

[141] 1 *Procurement Commission Report* 39.

[142] *Id.* at 38 (Recommendation 11).

[143] *Id.* at 39.

[144] 1 *Recommendations and Reports of the Administrative Conference of the United States* 30 (1970).

[145] 1 *Procurement Commission Report* 39.

> Effective immediately, all agencies and offices of the Department which issue rules and regulations relating to public property, loans, grants, benefits, or contracts are directed to utilize the public participation procedures of the APA, 5 U.S.C. 553. Although the APA permits exceptions from these procedures when an agency for good cause finds that such procedures would be impracticable, unnecessary or contrary to the public interest, such exceptions should be used sparingly, as for example in emergencies and in instances where public participation would be useless or wasteful because proposed amendments to regulations cover minor technical matters.[146]

A similar policy statement was issued by the Department of Agriculture, also in 1971.[147] Because of those statements both agencies (HEW and Agriculture) have since been held to the APA rulemaking requirements by courts in otherwise exempt areas (grants and benefits).[148] As agency policies, not required by statute, they can, of course, be rescinded or modified; but so long as they stand unqualified, the section 4(2) exemption does not exist for HEW or the Department of Agriculture programs and agencies. Consequently, that exemption cannot furnish justification for SSA's failure to follow APA rulemaking procedures in promulgating the terms of the agreement (the "Model Agreements") on which it would undertake administration of state supplementary payments.

b. "Good Cause"

Very likely under the time pressures which existed in 1973 (made worse by the mandatory supplement legislation) "good cause" existed for waiving full Section 4 procedures. (Although the terms of that section would have required stating that "good cause" was the ground for noncompliance.)[149] But later revision of the model or standard terms in 1974 and 1976 cannot lay claim to such a justification. Furthermore, the "good cause" exception (as distinguished from that which applies—in the absence of agency waiver —to "public property, loans, grants, benefits, or contracts") applies only to the notice and comment provisions of section 4.[150]

c. Interpretative Rules

"Interpretative rules" also need not be issued in accordance with section 4 "notice and comment." The "Model Agreement" forms developed in 1973, 1974, 1976 were probably thought to fall under that head—internal instructions on negotiating position for Social Security Administration personnel dealing with particular states. The difficulty with that view is that agency personnel in fact had little or no discretion to modify the terms. The "Model Agreements" were ultimately presented, with the exception of minor detail, on a "take it or leave it" basis to individual states; and once executed they had the "force and effect of law."

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[146] 36 Fed. Reg. 2532 (1971).

[147] 36 Fed. Reg. 13,804 (1971). *See* Rodway v. United States Dep't of Agriculture, 514 F.2d 809 (D.C. Cir. 1975).

[148] Rodway v. United States Dep't of Agriculture, 514 F.2d 809 (D.C. Cir. 1975); NWRO v. Mathews, 533 F.2d 637 (D.C. Cir. 1976).

[149] 5 U.S.C. § 553(b)(B) (1976).

[150] There is, however, a separate provision for "good cause" waiver of the requirement that a substantive rule be published 30 days prior to its effective date. 5 U.S.C. § 553(d)(3) (1976).

The principal characteristic of an interpretative rule is that it has no such binding effect on legal rights as they may be adjudicated in court. Interpretative rules express the agency's own view on a legal question, to which a court may defer, but do not represent an effort at statutorily authorized law making.[151] Because the Model Agreements had the effect of law (once executed) they were more than mere agency interpretation of statutory language. Furthermore, even interpretative rules with substantial impact have been required by some courts to meet section 4-like procedural requirements.[152]

d. Adequate Notice Without Publication

APA section 3(a)(1) directs publication in the *Federal Register* of rules —not covered by the "notice and comment" promulgation procedure. Thus, both the Armed Services Procurement Regulations and the Federal Procurement Regulations, including in both cases standard contract clauses (optional and mandatory), are published in the *Federal Register* even though not issued by the Department of Defense and GSA in compliance with section 4 procedures.

An agency can dispense with notice of a proposed regulation in the *Federal Register* if all "persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law."[153] If states are viewed as the only "persons" subject to the agreement terms, such alternative notice, coupled with an opportunity for comment, was functionally present in 1973, 1974, 1976. However, after notice of proposed rules with the opportunity for comment demanded by Section 4(b), whether actual or published, the agency must consider "the relevant matters presented" and "incorporate in the rules adopted a concise general statement of their basis and purpose."[154]

2. Government Contract Statutes

Numerous statutes and regulations establish procedures for contracting by federal agencies, prescribe standard contract clauses, and govern resolution of claims arising out of "government contracts."[155] (Most of the statutes are collected in title 41 of the *United States Code,* "Public Contracts," while the regulations appear in title 41 of the *Code of Federal Regulations.*) An essential question for those shaping the model agreement terms in 1973 was the applicability of those diverse legal requirements to this novel form of agreement.

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[151] *See K. Davis, Administrative Law of the Seventies* § 5.03 (1976).

[152] *Id.* § 6.01-8 (1976).

[153] 5 U.S.C. § 553(b) (1976).

[154] 5 U.S.C. § 553(c) (1976).

For example, 41 U.S.C. § 22 provides:

> In every contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no Member of Congress shall be admitted to any share of such contract or agreement, or to any benefit to arise thereupon . . . .

41 C.F.R. § 1.805-3 requires the inclusion of a clause entitled "Utilization of Concerns in Labor Surplus Area" in "all contracts in amounts which may exceed $100,000 except [certain categories not pertinent here]."

The initial version of the model agreement for Federal administration included a set of general provisions as "Appendix B." Those provisions were 10 clauses required by statute or regulation to be included in certain government contracts. Ultimately, they were dropped from the agreement.

The principal statute regulating government contracting and furnishing the authority for the Federal Procurement Regulations is the Federal Property and Administrative Services Act of 1949, as amended.[156] The relevant sections quite clearly apply only to the "procurement of supplies and services" by the federal government or "purchases and contracts for supplies or services," rather than all contracts entered into by the Federal government.[157] Accordingly they have no application to contracts in which the Federal government furnishes a service and cash is paid by a state government. The language of most other statutes and regulations dealing with "government contracts" shows the same intended scope—purchase of goods or services, purchase or lease of land—contracts which exercise the "spending power" implicit in Article 8 of the U.S. Constitution to acquire something. But not all are clearly so limited.[158] None of the doubtful ones, however, relate directly to the agreement formation process. The only issue they raise is whether the agreements should include certain terms or conditions which on the one hand seem likely to cause little inconvenience to the parties, but on the other have no apparent relevance to agreements of this unusual sort.[159]

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[155] *See generally* 4 *Procurement Commission Report* 167–228.

[156] 41 U.S.C. § § 251–60 (1970).

[157] *See, e.g.,* 41 U.S.C. § 252(a) (1970) ("Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this chapter and implementing regulations . . . . "); 41 C.F.R. § 1-1.208 (1977) ("Contract" means establishment of a binding legal relation basically obligating the seller to furnish personal property or nonpersonal services . . . and the buyer to pay therefore.)

[158] *See* 41 U.S.C. § 22 (1970), quoted in the text.

The only exception is a statute which affects the agreement formation process indirectly. The "Wunderlich Act," one of the few statutes which seemingly apply to Federal government contracts generally not just procurement contracts, while not specifying any particular contract language nonetheless constrains contract provisions dealing with potential disputes and liability claims. It states:

> § 321. No provision of any contract entered into by the United States relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is [fraudulent] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> § 322. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.[160]

Nothing in the language, evident purpose, or legislative history of those two sections compels the view that they are limited in effect to procurement contracts. Court decisions have, indeed, read them as reaching other types of government contracts.[161] Consistent with a broader interpretation of their scope, the "disputes" language of the Model Agreements purports to give only limited finality to the Federal agency determinations it authorizes. The earliest version of that language tracked the Wunderlich Act provisions closely. Later versions, though less detailed in their agreement with the Act, still explicitly acknowledged limited finality in the event of judicial review.

3. *Judicial Review*

A state desiring to challenge a Model Agreement term on grounds that it violated the statute or regulation, or indeed had been promulgated in violation of the APA rule making requirements would turn to 5 U.S.C. §§ 702-06 (1976) (formerly section 10 of the APA). Those sections establish a right to judicial review for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[162] A recent amendment, recommended by the Administrative Conference eliminates sovereign immunity as a possible bar in such actions "seeking relief other than money damages."[163]

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[159] The GSA, Standard Form 114C (March 1974 ed.), which is used in contracts for the sale of government property (a non-procurement contract) contains three "statutory" clauses presumably on the ground that they are not limited to procurement—the "Covenant Against Contingent Fees" (41 U.S.C. § 254(a) (1970)), and the standard "Officials Not to Benefit" (41 U.S.C. § 22(1970)) and "Assignments of Contracts" (41 U.S.C. § 15 (1970)) clauses. Their inclusion in the SSI agreements would represent simply so much excess baggage.

[160] 41 U.S.C. § § 321, 322 (1970).

[161] *See* M. Berger Co. v. U.S., 199 F. Supp. 22 (W.D. Pa. 1961) (contract to purchase surplus property from Federal government).

The statutory requirement that the action, to be reviewable, must be a "final agency action" and not a "preliminary, procedural, or intermediate agency action"[164] might create some difficulty. Yet at the point, prior to execution, that SSA has released a set of Model Agreements no longer subject to state bargaining, it would appear that a "final agency action" has occurred. The matter is "ripe" for review at that point, applying the two-part standard laid down by the Supreme Court in *Abbott Laboratories v. Gardner.*[165] Both the "fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration"[166] force a conclusion that judicial consideration of a legal challenge to Model Agreement terms is appropriate prior to execution (rather than later).

The 1976 removal of the "amount in controversy" limit on Federal District Court jurisdiction under 28 U.S.C. § 1331 for actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity" (again at the recommendation of the Administrative Conference) assures jurisdiction.[167] Any state claim of the sort discussed here would be one arising "under the Constitution, laws or treaties of the United States."[168]

The "standing" barrier, which used to halt all potential contractors seeking judicial review of the procedures or terms being employed by a Federal agency in a procurement contract setting, poses little threat under these very different circumstances.[169] While both the private firm seeking a defense contract and a state contemplating a Federal administration agreement are would-be parties to a contract with the Federal government, similarity ceases beyond the most superficial level. The purposes of the respective statutory schemes are totally different. Far more clearly than a private firm challenging a procurement regulation or award, a state faced with an objectionable Model Agreement term is both "injured in fact" and "arguably within the zone of interest protected or regulated" by the challenged rule or action—the standing test laid down by the Supreme Court in 1970.[170] Indeed, some recent decisions have found that test met in suits by private firms over procurement policies.[171]

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[162] 5 U.S.C. § 702 (1976).

[163] *Id.*

[164] 5 U.S.C. § 704 (1976).

[165] 387 U.S. 136 (1967).

[166] *Id.* at 149.

[167] *See* Publ. L. No. 94-574, § 2, 90 Stat. 2721 (1976).

[168] 28 U.S.C.A. § 1331(a) (Supp. 1978).

[169] Wrote the Supreme Court in Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940):

> Like private individuals and business, the government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal and to fix the terms and conditions upon which it will make the purchase. . . .
>
> Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties "require an interpretation of the law."

B. Post-Agreement Disputes

1. Wunderlich Act and Interpretation of the Disputes Clause

The pertinent Social Security Act provisions are totally silent on the possibility of and therefore treatment of disputes between states and the Federal agency concerning each other's compliance with the terms of an executed agreement.[172] Consequently, the APA requirements for Federal agency adjudications do not apply. They are limited to situations of "adjudication required by statute to be determined on the record after opportunity for an agency hearing."[173]

The only basis for an agency hearing is furnished by the terms of the Model Agreements themselves. The "disputes" paragraph, discussed in Parts 3 and 4, establishes a series of determinations and redeterminations by officials of the Federal agency on certain questions which the parties cannot mutually resolve. Evolution of the paragraph through successive revisions has produced some change but the basic contours have remained undisturbed.[174]

Such clauses have a long history in government contracts.[175] They are currently standard in both Federal procurement contracts[176] and contracts for the sale of surplus government property.[177]

It is firmly established that the statutory authority to contract (or presumably to enter into an agreement) carries with it the authority to create such an administrative procedure by contract.[178] With very limited exceptions, Federal courts have applied such clauses as written—leaving the parties to whatever procedural protections "their" clause affords and granting any resulting administrative determination the degree of finality specified in the contract. In United States v. Moorman, 338 U.S. 457 (1950), the Supreme Court held that if a "disputes" clause specified complete finality that applied to administrative determinations on questions of law as well as issues of fact. In United States v. Wunderlich, 342 U.S. 98 (1952), it held that only proof of fraud in connection with the agency decision would warrant a court upsetting a factual determination under a clause in which the parties "agreed" to the finality of the administrative hearing process.

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[170] Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152–53 (1970). *See also* Barlow v. Collins, 397 U.S. 159 (1970).

[171] *See, e.g.*, Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). *See generally* Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, 1974 *Wisc. L. Rev.* 301, 330–32, 339–40.

[172] *See* p. 79 *supra*.

[173] 5 U.S.C. § 554 (1976).

[174] *See* pp. 132–135 *supra*.

[175] *See H. Petrowitz, Operation and Effectiveness of Government Boards of Contract Appeals, S.Doc. No.99,* 89th Cong. 2d Sess. (1966).

[176] *See* 41 C.F.R. § 1–7.102–12 (1977).

[177] *See* GSA, Standard Form 114C, § 19 (1974 ed.).

Congress responded to those decisions with the Wunderlich Act, quoted on p. 5.8 *supra,* which limits the ability of contract or agreement provisions to establish the finality of administrative determinations—on questions of law and fact. It is the only Federal statute bearing directly on the administrative process established by the terms of SSA's Model Agreements. And its effect is limited to the judicial treatment of any resulting determinations. The extent of the hearing rights, the degree of independence of the decider, time limits on the various stages of the administrative process—all these are set solely by the terms of the agreement. Furthermore, the existence of such an "agreed upon" procedure means that a failure to employ it, a failure to submit an initial request for determination or to press an appeal all the way to the top, precludes judicial recognition of the claim. Courts require "exhaustion" of the procedures established by such contractual terms.[179] Moreover, judicial review of agency decisions on matters covered by such clauses is review on the record established before the agency, not "de novo."[180]

The substantial effect which such clauses have on the rights of a contracting party to judicial consideration of a claim has put a great deal of stress on questions of "disputes" clause scope. Matters outside the scope of such a clause need not be submitted to the relevant agency for administrative resolution before being taken to Federal court nor need a court heed any agency decision on them.

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[178] In 1875 the Supreme Court held that since Congress had authorized the executive branch to make contracts "it would be of serious detriment to the public service if [that] . . . power . . . did not extend to providing for all possible contingencies by modification or suspension of the contracts, and settlement with the contractors." United States v. Corliss Steam-Engine Co., 91 U.S. 321, 323 (1875). *See also* Kilberg v. United States, 97 U.S. 398 (1878).

[179] *See* Speidel, *Exhaustion of Administrative Remedies in Government Contracts,* 38 N.Y. L. Rev. 621 (1963).

[180] *See* United States v. Carlo Bianchi, 373 U.S. 709 (1963); United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966).

Part 4 notes the uncertain application of the three versions of the Model Agreement disputes paragraph to the various controversies over agreement terms and compliance in which the parties (SSA and the states) have in fact been embroiled.[181] Despite the amendment of that paragraph in 1976 so that it now applies "if the Secretary and the State are unable to agree upon *any matter in dispute arising under this agreement,"* that uncertainty remains. The new language is close though not identical to standard procurement contract "disputes" clause language, which has been held limited to disputes over questions for which the contract through some other clause provides explicit remedy. Changes in specifications ordered by the government, late delivery essential government furnished property, and the like are covered by other clauses that specify adjustment of the contract price.[182] The existence of provisions authorizing contract price adjustment render those questions—matters "arising under the contract". By contrast a Government action or failure to act which constitutes an arguable instance of noncompliance (breach) for which no specific price adjustment is authorized does not, the cases hold, "arise under the contract".

In *United States v. Utah Construction & Mining Co.* the Supreme Court confronted an assertion by the Justice Department that those decisions were wrong and that the standard "disputes" clause used in procurement contracts should be construed as authorizing and compelling "administrative action in connection with all disputes arising between the parties in the course of completing the contract."[183] The clause in that case referred to "all disputes concerning questions of fact arising under this contract." The Supreme Court firmly rejected the government's position, relying on the "uniform, continuous, and long-standing judicial and administrative construction of the disputes clause"[184] as limited "to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief."[185] The Court did suggest, however, that expansion of the scope of the clause could be accomplished either by creating additional adjustment provisions for acts which would otherwise constitute breach or by modifying the language of the clause:

> Thus the settled construction of the disputes clause excluded breach of contract claims from its coverage, whether for purposes of granting relief or for purposes of making binding findings of fact that would be reviewable under Wunderlich Act standards rather than *de novo*. This is not to say that the Government does not have a powerful argument for construing the disputes clause to afford administrative relief for a wider

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[181] *See* pp. 138–158 *supra.*

[182] *See, e.g.,* 41 C.F.R. § § 1-7.102-2, 1-7.303-7 (1977).

[183] 384 U.S. 394, 404 (1966).

[184] *Id.* at 405.

[185] *Id.*

> spectrum of disputes arising between the contracting parties. It can be argued, as the Government persuasively does, that the same considerations which initially led to providing an administrative remedy in those situations covered by such clauses as Articles 3, 4 and 9 of the contract [three adjustment clauses] also support the broader reading of the disputes clause permitting and requiring administrative fact finding with respect to all disputes arising between the contracting parties. But the coverage of the disputes clause is a matter susceptible of contractual determination . . . , subject to the limitations on finality imposed by the Wunderlich Act, and one would have expected modification of the disputes clause to encompass breach of contract disputes if the restrictive interpretation of Article 15 was thought unduly to hinder government contracting. In fact the contracting departments have not rejected the narrower judicial reading of the disputes clause nor attempted any wholesale revision of its language to cover all factual disputes. Instead they have acted to create alternative administrative remedies for some breach of contract claims and to disestablish others by fashioning additional specific adjustment provisions contemplating relief under the contract in specified situations not reached by such provisions as Articles 3,4 and 9.[186]

Today the standard procurement contract contains a great variety of adjustment provisions which, as interpreted, bring most, though not all issues of government non-compliance or breach "under the contract."[187] (Contractor breach or non-compliance is not so completely covered, although a "default" termination by the government can be challenged under the "disputes" clause and if it is determined "default did not exist," the standard terms provide for conversion of the termination into one "for the convenience of the government" which carries a more generous measure of compensation.)[188]

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[186] *Id.* at 412–13. A 1972 Fifth Circuit decision involving an unambiguous "all disputes clause" held a contractor's claim for damages arising out of alleged government breach barred for failure to exhaust the "disputes" clause procedure even though the contract contained no relevant adjustment clause. Patton Wrecking & Demolition Co. v. TVA, 465 F.2d 1073 (5th Cir. 1972). The disputes clause in that case applied to:

> Any dispute arising out of or connected in any way with any obligation of the parties arising out of the performance or nonperformance of the contract whether arising before or after completion of performance, including disputes as to any alleged violation or breach thereof. . . .

[187] *See* Saltman, *"Breach of Contract: The Comptroller General, the Boards, the Courts and the All-Disputes Clause,* 7 Pub. Contract L.J. 123 (1974); Lane, *Administrative Resolution of Government Breaches—The Case for An All-Breach Clause,* 28 Fed. B.J. 199 (1968); Witte, *Administrative Resolution of Government Breaches—A Solution Without a Problem,* 28 Fed. B.J. 234 (1968).

[188] *See* 41 C.F.R. § § 1–8.707,1–8.701 (1977).

The SSA Model Agreements by contrast contain very few adjustment provisions. Adjustment is provided for in the case of excessive error by the Federal agency, but not in connection with numerous other ways in which the parties may fail to meet standards of performance set by the agreement.

2. *Judicial Remedies*

a. State Claims

The established avenue of judicial relief open to the private party to a government procurement contract lies with the Court of Claims under the Tucker Act.[189] Compensation provided for in the contract or damages awarded for its breach are available in such a suit. If the matter is covered by a "disputes" clause, the court's role is limited to review on the record. If the matter lies outside the scope of a disputes clause the case is heard *de novo.*

While the Federal agency might assert that the SSI agreements are not a "contract" for purposes of establishing Tucker Act jurisdiction and the associated waiver of sovereign immunity on contract claims,[190] the Court of Claims decisions suggest strongly that it would reject such an agrument. A wide range of government agreements have been held "contracts" creating Tucker Act jurisdiction. For example, the Court of Claims has found jurisdiction to hear the reimbursement claims of Medicare providers under their agreements with HEW. The statute characterizes the arrangements as "agreements".[191] the Court of Claims considers them contracts within the meaning of the Tucker Act.[192]

A Disaster Assistance Agreement between a state and the Federal Office of Emergency Planning has also been held a Tucker Act "contract". In Texas v. United States, 537 F.2d 466 (Ct. Cl.1976) the Court of Claims rejected the state's claim that the federal government had not paid the amount due under such an agreement, but said:

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[189] 4 *Procurement Commission Report* 2–3.

The Tucker Act provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

28 U.S.C. § 1491 (1970). (Federal district courts are granted concurrent jurisdiction over such claims but only when the amount does not exceed $10,000. 28 U.S.C. § 1346(a)(2) (1970)).

[190] The 1976 Model Agreements' "disputes" paragraph states:

> Nothing in this agreement shall be construed as waiving the Secretary's right to assert lack of jurisdiction with respect to any suit brought under this agreement . . .

[191] 42 U.S.C. § 1395cc (1970).

[192] Overlook Nursing Home, Inc. v. United States, 556 F.2d 500 (Ct. Cl. 1977); Whitecliff, Inc. v. United States, 536 F.2d 347 (Ct. Cl. 1976).

> At the outset both parties devoted considerable argument as to whether their Disaster Assistance Agreement is, as plaintiff contends, a contract, or as defendant asserts, not "a binding contract in the traditional sense." In our view defendant's valid execution of a document, which it prepared and titled "Federal-State Disaster Assistance Agreement," specifying that "Federal Assistance will be made available in accordance with [various specified laws, Executive Orders and regulations]" obligates defendant to provide such assistance as called for by the parties' Agreement. See State of Arizona v. United States, 204 Ct. Cl. 171, 494 F.2d 1285 (1974).

It also noted that:

> The Comptroller General has ruled that executed Disaster Assistance Agreements impose enforceable obligations on both parties to the Agreement. Comp. Gen. Decision B-167790 (January 15, 1973). See also 42 Comp. Gen. 289 (1962).

In Pennsylvania v. United States, 207 Ct. Cl. 1029 (1975) a Federal-Aid Project Agreement covering construction of a filtration plant was held a contract on which the Federal government could be sued. The authorizing legislation in that case, the Federal-Aid Highway Act, does, however, explicitly state: "[The Secretary's] approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." 23 U.S.C. § 106(a) (1970).

An agreement between a county flood control district and the Department of Agriculture under the Watershed Protection and Flood Protection Act, supplemented by an "attorneys' fees contract" was held to support jurisdiction in Contra Costra County Flood Control & Water Conservation Dist. v. United States, 512 F.2d 1094 (Ct. Cl. 1975).

A suit in Federal District Court seeking injunctive or declaratory relief, rather than damages, poses more serious difficulties. The jurisdictional basis of such a suit would be a Federal question jurisdiction under 28 U.S.C. § 1331. The judicial review section of the APA would appear to permit suit by the state as a party aggrieved by "final agency action;"[193] however, sovereign immunity or some similar defense might stand in the way.

In Minnesota v. Weinberger, 359 F. Supp. 789 (D. Minn. 1973) the court combined arguments of sovereign immunity and the existence of an adequate remedy before the Court of Claims to reject a state's suit seeking monetary relief against Federal officials on a contract theory. The decision rested in part on the APA section that provides: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review." (The court went on to find a statutory basis for mandamus in that particular case.) A similar denial of relief occurred in International Engineering Co. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975), a suit to enjoin the government's release of trade secrets in violation of contract provision. The court, in the latter case, not only relied on the adequacy of the Court of Claims remedy but concluded that a "final agency action" was not involved.

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[193] 5 U.S.C. § 702 (1976).

On the other hand, decisions can be found awarding injunctive or declaratory relief on claims also congnizable as contract damage actions in the Court of Claims.[194]

Ironically, the 1976 amendment to 5 U.S.C. § 702 which removed "sovereign immunity" as a bar in most actions to review agency action adds force to the argument that in "contract" situations "sovereign immunity" still stands except in suits under the Tucker Act. Pub. L. 94-574, implementing a recommendation of Administrative Conference, added two sentences to § 702 reading:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party. The Unites States may be named as a defendant in any such action, and a judgement or decree may be entered against the United States. . . .[195]

Their purpose according to the House Judiciary Committee's report was to eliminate the "sovereign immunity defense" in some, though not all, actions under § 702:

> The explicit exclusion of monetary relief makes it clear that sovereign immunity is abolished only in actions for specific relief (injunction, declaratory judgement, mandatory relief, etc.). Thus, limitations on the recovery of money damages contained in the Federal Tort Claims Act, the Tucker Act, or similar statutes are unaffected.[196]

If the legislation had said no more, it would have supported rather than undercut suits by states seeking non-monetary relief against Federal agency action claimed to violate the SSI agreements. But the amendments also added a proviso to § 702, which reads:

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[194] *See, e.g.,* Mount Sinai Hosp., Inc. v. Weinberger, 517 F.2d 329 (5th Cir. 1975); Columbia Heights Nursing Home & Hosp. v. Weinberger, 380 F. Supp. 1066 (M.D.La. 1974). *See generally* Note, *The Interrelationship of the APA and the Tucker Act: The Government Contracts Example,* 64 Geo. L.J. 1083 (1976).

[195] Pub. L. No. 94–574, 90 Stat. 2721 (1976) (amending 5 U.S.C. § 702).

[196] *H.R. Rep. No. 1656,* 94th Cong., 2d Sess. 11, reprinted in [1976] *U.S. Code Cong. & Ad. News* 6121, 6131.

> Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.[197]

The House Committee's explanation used the Tucker Act to illustrate the intent of that language:

> . . . [The] proviso [is] concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the Court of Claims Act, Congress created a damage remedy for contract claims with jurisdiction limited to the Court of Claims except in suits for less than $10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, *i.e.*, the Tucker Act, "impliedly forbids" relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well as patent infringement, tort claims, and tax claims.[198]

b. Federal Claims

Assuming that the SSI Federal-state agreements establish enforceable contractual obligations, the Federal government can seek appropriate judicial relief in instances of state non-compliance—damages, injunction, or declaratory judgement. Suit would be in Federal district court under 28 U.S.C. § 1345 (1970) which provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.[199]

The lack of explicit statutory authority to sue to enforce the agreements should not stand in the government's way:

> The Supreme Court long ago made it clear that the executive does have authority to bring suit in some situations even though the Constitution says nothing explicitly concerning such power and even

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[197] 5 U.S.C. § 702 (1976).

[198] *H.R. Rep. No. 1656,* 94th Cong., 2d Sess. 12-13, reprinted in [1976] *U.S. Code Cong. & Ad. News* 6121, 6133.

[199] There is also original though not exclusive jurisdiction in the Supreme Court. 28 U.S.C. § 1251(b) (1970).

> though Congress has not expressly granted such power. The first of such situations recognized by the Court involved the proprietary and contractual interests of the federal government. Dugan v. United States, 16 U.S. (3 Wheat.) 172, 4 L.Ed. 362 (1818) (suit on a bill of exchange); United States v. Tingey, 30 U.S. (5 Pet.) 115, 8 L.Ed. 66 (1831) (suit for breach of contract); Cotton v. United States, 52 U.S. (11 How.) 229, 13 L.Ed. 675 (1850) (suit for trespass). Broadly speaking, the Supreme Court concluded that the power to bring suit was a logical and necessary adjunct to the executive's power to oversee the national government's proprietary and contractual interest. See also United States v. California, 332 U.S. 19, 27, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947).[200]

On matters covered by the disputes paragraph the Federal government would be bound (under its present terms) to accept the finality of administrative decisions not appealed by the state.[201] On matters falling outside the paragraph, the government's action would in effect seek enforcement of a contract.

Far more likely than such an action, however, in cases of liability dispute would be an offset of amounts believed due from a state against payments the state is entitled to under some other program. Use of this standard technique puts the burden of suit back on the state.[202] It should not, however, avoid the effect of the "disputes" paragraph on questions of liability within its scope.

C. Impact of the Federal Grant and Cooperative Agreement Act of 1977

The Commission on Government Procurement, which reported to Congress in December 1972 after more than two years of studying ways "to promote the economy, efficiency, and effectiveness of Federal procurement," concerning itself—as a peripheral matter—with the confusion over the differences between those legal relationships and procedures associated with procurement and with grant-type assistance.[203] As it pursued the matter the Commission expanded its study of grants beyond the simple question of proper boundaries. Compared to the reasonable degree of central guidance and uniform terminology that characterized procurement, it found the area of "grant-type assistance" chaotic. The Commission's report attributed the "disarray" to three causes:

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[200] United States v. Solomon, 419 F. Supp. 358, 363 (D. Md. 1976). *See generally* Note, *Nonstatutory Executive Authority to Bring Suit,* 85 *Harv. L. Rev.* 1566 (1972).

[201] *See* S & E Contractors v. United States, 406 U.S. 1 (1972).

[202] *See* Mt. Sinai Hospital v. Weinberger, 517 F.2d 329 (5th Cir.), *modified* 522 F.2d (5th Cir.), *cert. denied,* 425 US 935 (1976).

[203] 3 *Procurement Commission Report* 153.

Confusion of grant-type assistance relationship and transactions with procurement relationships and transactions.

Failure to recognize that there is more than one kind of grant-type relationship or transaction.

Lack of Government-wide guidance for Federal grant-type relationships and transactions.

The Commission recommended legislation to deal with these problems and after several abortive attempts Congress complied with the Federal Grant and Cooperative Agreement Act of 1977.[204] The Act does several things. First, it establishes uniform terminology—reserving the word "contract" for "procurement contracts" and establishing the labels "grant agreements" and "cooperative agreement" to denote the relationships under the two categories of grant-type assistance distinguished by the Commission. (The Commission on Government Procurement had discovered that some grants were reflected in "grant-contracts.")[205] Next, it explicitly requires use of a "procurement contract" (necessitating compliance with all pertinent procurement statutes and regulations) rather than a grant instrument "whenever the principal purpose [of the agency] is the aquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government."[206] (It *allows* use of a procurement contract rather than a grant instrument in other cases where the agency "determines [it] appropriate.")[207] The new law *authorizes* use of grant-type instruments in appropriate cases, filling in lacking statutory authority for some agencies.[208] (The Procurement Commission's report had noted that "each year, for its training programs, the Department of Labor writes some 7,000 cost-reimbursement [procurement] contracts with state and local governments because it does not have statutory authority to use grants.")[209]

The two types of grant instruments distinguished by the Act art: "grant agreement" and "cooperative agreement." Both share a common definition of the purpose of the relationship and are separated by whether or not "substantial involvement between the [Federal] agency . . . and the state or local government or other recipient during performance" is anticipated. If so, a type of "cooperative agreement" should be used. If not, a type of "grant agreement."[210]

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[204] Pub. L. No. 95-224, 92 Stat. 3 (1978).

[205] 3 *Procurement Commission Report* 156. The Commission's Report argued flatly: "The term 'contract' should be restricted to procurement relationships. The term should not be used to express assistance-type relationships regardless of the type of recipient being assisted." *Id.* at 164.

[206] *Id.* § 4(1).

[207] *Id.* § 4(2).

[208] *Id.* § 7(2).

[209] 3 *Procurement Commission Report* 159.

[210] *Compare* Pub. L. No. 95-224, § 5(2), 92 Stat. 3 (1978) *with id.* § 6(2).

In either case "the principal purpose of the relationship [should be] the transfer of money, property, services, or anything of value to the state or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government."[211] (Excluded are agreements "under which only direct Federal cash assistance to individuals, a subsidy, a loan, a loan guarantee, or insurance is provided.")[212]

Finally, the legislation authorizes "the Director of the Office of Management and Budget . . . to issue supplementary interpretative guidelines to promote consistent and efficient use of contract, grants agreement, and cooperative agreements as defined in [the] Act,"[213] and also to "undertake a study to develop a better understanding of alternative means of implementing Federal assistance programs, and to determine the feasibility of developing a comprehensive system of guidelines for Federal assistance programs."[214]

Whether the Act touches at all on the SSI supplementation agreements is unclear. Indeed, the attempt to fit those agreements against the terms of the law furnishes another illustration of their novelty.

One point is certain; if there were any doubt, the Federal Grant and Cooperative Agreement Act of 1977 confirms the conclusion that procedures and forms prescribed for "procurement contracts" are inappropriate for this sort of relationship in which the "principal purpose" is not "acquisition . . . of property or services for the direct benefit or use of the Federal Government."[215] Less certain is whether the new label "cooperative agreement" and contemplated future guidelines governing such agreements apply. Both the Commission on Government Procurement and Congress had traditional grant programs in mind in recommending and enacting these provisions—that is, programs characterized by a flow of Federal money or the equivalent to a grantee who (with varying degrees of Federal supervision) carries on the subsidized activity. The Commission's Report, for example, at one point characterizes assistance as supporting "functions and objectives . . . carried out by state and local governments, educational institutions, other nonprofit organizations, and individuals *rather than by or under the direct control of the [Federal] Government.*" (Emphasis added.)[216]

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[211] *Id.* § § 5(1), 6(1).

[212] *Id.* § 3(5).

[213] *Id.* § 9.

[214] *Id.* § 8. The Commission on Government Procurement identified the problem as follows:

> A variety of media is used to issue government-wide guidance to granting agencies. What guidance there is occurs in various GSA and OMB issuances, letters to agencies from the Office of Science and Technology (OST), Presidential memorandums to heads of agencies, and Executive orders. This guidance is not issued systematically through a medium similar to procurement regulations.
>
> Almost all agencies acknowledge the need for Government-wide guidance on grant-type activities, provided that the guidance is well conceived and administered.

3 *Procurement Commission Report* 159–60.

[215] *See id.* § 4. *See also* note 219 *infra.*

State supplementation agreements, by contrast, involve not merely Federal "intervention" but Federal activity. However, from one vantage point it is possible to fit the agreements within the Act's formula as a "transfer of services . . . to accomplish a public purpose of support or stimulation" . . . with "substantial involvement . . . between the [Federal agency] and the State . . . government."[217]

In light of the legislative history of the Act and its purposes a sounder view is that this is not a relationship whose "principal purpose" is a transfer to the recipient but rather one whose "principal purpose" is a transfer to the Federal government—that it is, therefore, a type of relationship not dealt with by the Act. (The Act manifestly does not embrace all Federal-state contracts or agreements. There are, first of all, express exclusions—"subsidy, loan, a loan guarantee, or insurance."[218] In addition, certain other transactions, like the sale of surplus property, clearly fall outside its provisions.) To underscore the distinction, the SSI and future agreements of like kind might better be given a more complete label than the present "Agreement"—something like "Federal Administration Agreement," for example. (A central purpose of the Act is to reduce the use of similar terminology to describe dissimilar relationships.)

Not much is at stake so long as the question is simply one of labeling—i.e., should the agreements be called "cooperative agreements" or something else. However, future guidelines appropriate to "grants" may very well not be suitable for these quite different agreements.

While the Act substitutes the word "agreement" for "contract" in all situations of grant assistance, there is no suggestion in its specific provisions or legislative history that this was intended to affect the application of those statutory references to "contracts" which have been construed as reaching beyond the procurement setting.[219] The Commission on Government Procurement noted, for example, that some agencies' grant instruments contain standard clauses required of government "contracts" by statute.[220] One of the subjects it urged for study (the study of guidance authorized the Act) was "the applicability of clauses now used in procurement to assistance transactions."[221] Thus, the scope of the "contract" references in the Wunderlich Act and the Tucker Act ought to remain undisturbed by the new act. Their applicability to grant agreements or the SSI supplementation agreements should not be affected.

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[216] 3 *Procurement Commission Report* 161.

[217] Pub. L. No. 95-224, § 6(1), 92 Stat. 3 (1978).

[218] *Id.* § 3(5).

[219] The intent is clear, however, that regulations and statutes applying to *procurement* contracts shall not govern activities properly handled through a "grant agreement" or a "cooperative agreement." *See S. Rep. No. 449,* 95th Cong., 1st Sess. 11 (1977).

[220] 3 *Procurement Commission Report* 158–59.

PART 6. THE NEW COOPERATIVE FEDERALISM COMPARED TO THE OLD, EVALUATION AND RECOMMENDATIONS

A. *The Grant-in-Aid Procedures Compared*

While it oversimplifies the relationship, it is useful to view AFDC and the three grant-in-aid programs which preceded SSI (Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled) as state welfare programs partially funded by the Federal government. The initial establishment of a program, any significant expansion of its coverage along with administration and annual funding decisions all rest (or rested) initially on state agencies and legislatures. The states establish, set funding levels and amend their programs with the Federal agency's role being limited to determining whether the standards that control the availability of Federal financial contribution have been met. While the Federal agency has a weapon of great theoretical influence in its statutory authority to determine that a state plan does not meet Federal standards, the formal arrangements put important practical limits on its ability to use that weapon to secure the enactment of new states' policies or implementation of administrative measures it deems necessary. (This was particularly true during the many years before recipients succeeded in getting Federal courts to address some of these questions of state program compliance with Federal standards.)

Martha Derthick's important study of intergovernmental relations in public assistance notes, after recounting a failure of behind-the-scenes Federal influence which had sought passage of legislation in Massachusetts the Federal agency thought necessary for full compliance with the Social Security Act:

> [The] incident . . . illustrates the limits and ambiguity of the federal administrators' position when a conflict occurs. They must exercise influence without seeming to. If they seem to exercise it, they become vulnerable to congressional intervention and probably also to general criticism: A large body of opinion holds that the federal government should not meddle in state and local affairs, and federal administrators naturally do not want to get caught doing so.[222]

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[221] *Id.*

[222] *M. Derthick, The Influence of Federal Grants* 117–18 (1970).

Somewhat later she observes:

> Federal enforcement is a diplomatic process. It is as if the terms of a treaty, an agreement of mutual interest to the two governmental parties, were more or less continuously being negotiated. In these negotiations, numerous diplomatic forms and manners are observed, especially by the federal negotiators. Typically they are in the position of having made a demarche. Negotiations become active when a new federal condition is promulgated or an old one is reinterpreted, or when a federal administrative review has revealed a defect in the state's administration. Negotiations are carried on privately. The federal negotiators refrain from making statements in public, for they want to avoid the appearance of meddling in the internal affairs of the states. They refrain from making overt threats. They are patient. Negotiations over a single issue may go on steadily for several years and intermittently for decades. They are polite. In addressing state officials, they are usually elaborately courteous. They make small gestures of deference to the host government, as by offering to meet at times and at places of its choosing.
>
> The objective of the negotiating process is to obtain as much conformance as can be had without the actual withholding of funds.[223]

With a grant-in-aid welfare plan, two types of interaction between state policies and procedures and Federal standards pose the possibility of conflict, with an attendant need for negotiation. The first involves questions of "conformity" between the plan's eligibility rules, formal procedures, or consistent operation and Federal requirements. Such questions may arise either upon state initiative, as when a state submits a new program or—as has normally been the case from 1938 on—an amendment to an existing program, seeking Federal "plan" approval, or more likely, as Derthick suggests, on the initiative of the Federal agency if its review of state practices raises some question of compliance. The question of compliance often flows from some addition to or modification of the Federal statute or a new agency view of existing provisions.

The second point of interaction and potential controversy lies at the point the state and Federal governments are totalling up how much Federal money the state is entitled to under the statutory aid formula. This operation presupposes an approved plan, the issue is simply whether a particular item or class of items is covered by: (1) the state plan and (2) the Federal grant-in-aid formula. There may also be a question concerning the appropriate rate of reimbursement. This type of issue is commonly called one of Federal "disallowance," for it arises when the state seeks reimbursement of an amount that the Federal agency disallows.

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[223] *Id.* at 209–210.

Prior to 1965 disputes between Federal and state agencies of both kinds were common. They were resolved exclusively by the process of negotiation described by Derthick, with possible recourse to Congress the principal avenue open to a state that believed it had been dealt with arbitrarily by the Federal agency. The Federal courts were not a promising forum in either kind of dispute. In 1954 Arizona sought review of an HEW determination that its plan did not meet Federal requirements; the suit was rejected for lack of jurisdiction.[224]

In 1965, Congress responded favorably to a recommendation from the Advisory Commission on Intergovernmental Relations[225] and enacted provisions reflecting a sensitivity to "state sovereignty" by granting states certain procedural protections in both conformity and disallowance disputes. States facing a possible cutoff of funds over a "conformity" question are, by that legislation, assured prior notice and a full administrative hearing by the Secretary of HEW, followed by judicial review in the U.S. Court of Appeals "for the circuit in which [the] state is located." [226] The statute deals less completely with disallowance or audit exceptions. No judicial review is mentioned in such cases and a less formal administrative determination is outlined.[227] This traces directly to the 1964 report of the Advisory Commission on Intergovernmental Relations which said the following about disallowance issues:

> Some state and local officials believe that some form of judicial reivew should encompass all aspects of the public assistance programs, including "matching" issues or audit exceptions. However, the much greater concern is for review of decisions regarding "plan conformity" issues. The Commission believes that to involve audit exceptions or issues other than those of plan conformity in the judicial review process would create many additional problems.[228]

Since 1965, three additional modes of formal interaction have developed in the grant-in-aid relationship. First, *King v. Smith,* decided by the Supreme Court in 1968,[229] introduced a new mechanism for raising some conformity questions (but only those having clear impact on recipients or applicants). This new mechanism, initiated by neither Federal or state agency, is a suit in Federal district court by recipients or applicants.

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[224] Arizona v. Hobby, 221 F.2d 498 (D.C. Cir. 1954).

[225] *Advisory Comm'n on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance* (1964).

[226] 42 U.S.C. § 1316 (1970).

[227] *Id.* ("[T]he State shall be entitled to and upon request shall receive a reconsideration of the disallowance.")

[228] *Advisory Comm'n on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance* 95 (1964).

[229] 392 U.S. 309 (1968).

Typically, the party sued is the state agency (technically the director). Ordinarily, the Federal agency is not a party in the suit, but HEW's regulations require states to notify it of such litigation and the agency often seeks to assert its views of Federal requirements as an *amicus curiae.*

The second development, which occurred in 1971, has already been discussed in Part 5. That year, HEW committed itself to issuing the regulations governing all its grant (and contract) programs in full compliance with the "notice and comment" rule making procedures of the Federal Administrative Procedure Act. [230] In the years since, this procedure has given states and other interested parties a formal opportunity to respond in advance to changes in HEW requirements. That opportunity for comment has been used effectively by the states and recipient groups. On several occasions, proposed standards have been modified to reflect their concerns. And—in a few cases—states have succeeded in challenging regulations eventually issued by HEW in court on procedural or substantive grounds—an opportunity materially assisted by the notice and comment procedure.[231]

Finally, during the early seventies, HEW began to show a strong interest in standards of administration that might be enforced by penalties less drastic (and therefore more credible) than total cutoff, but more compelling than an after-the-fact audit backed by disallowance. In some instances with the clear support of the statute, in others relying solely on regulation, the agency created variable fiscal penalties (reduced Federal reimbursement) to back a number of Federal norms. Assessment of state performance against such standards and the potential imposition of such penalties created another type of Federal-state dispute which the regulations characterized as a "disallowance" for purposes of determining state procedural rights.[232]

The increasingly stringent HEW review and larger disallowances of the seventies put strain on this system. States with large amounts at stake in disallowance disputes have sought to take the issues to Federal district court. However, as the decisions presently stand, a state confronted with a straight disallowance cannot count on having judicial review of its case.[233] The Federal government's litigating position appears to be that judicial review is not available—more specifically, that the section added to the statute in 1965 that grants judicial review of conformity determinations but only quite limited administrative review of disallowances must be read as expressing Congressional intent to keep the latter out of the courts. That position coupled with larger disallowances have created pressure for improvement of the administrative appeal open to a state. Only last year (1978) HEW transferred "reconsideration" of disallowances to the department's Grant Appeals Board. The new procedure gives states a full hearing before the Board and an independent and final decision by that body,[234] thus going beyond the terms of the 1965 statute and the original procedures established under it.[235]

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[230] 36 Fed. Reg. 2532 (1971).

[231] *See* NWRO v. Mathews, 533 F.2d 637 (D.C. Cir. 1976); Maryland v. Mathews, 415 F. Supp. 1206 (D.D.C. 1976).

[232] *See* 45 C.F.R. § 201.14 (1977).

[233] *See* County of Alameda v. Weinberger, 520 F.2d 344 (9th Cir. 1975); United States v. Pennsylvania, 533 F.2d 107 (3d Cir. 1976); State Dep't of Public Welfare v. Califano, 556 F.2d 326 (5th Cir. 1977).

A comparison of these procedures for resolving intergovernmental differences which have evolved under the grant-in-aid programs with those used and available in connection with the SSI Federal-state agreements reveals some significant differences. At the agreement-formation stage (with a grant-in-aid welfare program the equivalent point is plan approval or subsequent review of a state plan's conformity with Federal requirements) HEW now utilizes "notice and comment" rule making to set the basic procedural and substantive terms of the grant-in-aid relationship, with judicial review available to challenge regulations that violate the statute or are invalid on some other ground. Questions about whether an individual state is entitled to enter or continue in the grant-in-aid relationship ("conformity" questions) are the subject of a statutorily prescribed hearing, followed by judicial review in the U.S. Court of Appeals. By contrast, the SSI administration agreements have had most of their important terms set without "notice and comment" rule making. Judicial review is probably available to a state challenging a controversial agreement term insisted on by the Federal agency, although the Social Security Act does not provide for it. No clear procedural path is open in the event a state considers that it has been improperly denied an agreement, although, here too, judicial review may be available.

Individual liability questions (or other matters of agreement interpretation) also present a contrast. With a grant-in-aid program all questions of financial liability that are not "conformity" issues are, by virtue of HEW's 1978 regulation, appealable to the department's Grant Appeals Board for a hearing and decision on the record. Subsequent judicial review is, however, still in doubt. Questions of the parties' respective obligations which are neither "conformity" questions nor raised in the firm of disallowance have no clear route to follow. Under the SSI agreements, on the other hand, some questions must go through a contractually established "dispute" procedure, culminating, under the most recent terms, with an appeal also heard by the HEW Grant Appeals Board. The terms of the agreements (1976 version) do not, however, establish the Board as the final and independent decider of such questions. Other questions arising under the agreements have no certain administrative forum. Liability questions, whether or not subject to the "disputes" paragraph, seem fairly certain of a hearing in the Court of Claims under the Tucker Act, being "contractual" in nature. State questions which require non-monetary relief for their resolution may encounter difficulty in Federal district court.

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[234] 43 Fed. Reg. 9264 (1978).

[235] 45 C.F.R. § 201.14 (1977).

While there are major structural differences between the new "cooperative federalism" and the old, the foregoing discrepancies in procedural protections seem more the result of accident than careful thought. They appear to be primarily unforeseen consequences of reversing the money flow and characterizing the new relationship as an "agreement."

B. Evaluation and Recommendations

1. Agreement-Formation Stage

The establishment of the American Public Welfare Association as a liaison with the states was an excellent and imaginative way to build the sort of cooperative relationship, absolutely essential to the conversion from grant-in-aid state administered welfare to Federal administration of both basic Federal benefits and most state supplements in the very limited time available during 1973. The creation of a "negotiating" relationship with a contract committee representing state welfare and legal officials was by the same token an excellent way to reach basic terms for the Federal administration agreements which would reflect and respond to state interests and problems as well as the Federal interest. The Social Security Administration not only use these related mechanisms effectively for securing state input, but responded sufficiently to the state views presented that on three separate occasions 1973, 1974, and 1976, the state committee finally recommended the resulting terms to all individual states—as acceptable and, at least, the best that could be obtained.

At the same time, SSA's failure to comply with full "notice and comment" procedures may have denied individual states a direct opportunity to express their views on proposed agreement terms to the Federal officials ultimately responsible for their promulgation. Even more significant is the resulting exclusion of interested parties other than states from the agreement formation process. Some of the agreement terms have significant potential impact on recipients or applicants. Group representing such individuals have made effective use of the "notice and comment" procedure in connection with the grant-in-aid programs, so the exclusion very likely has more than nominal effect.

> Recommendation 1: The process of negotiation and agreement between the Secretary of HEW on the one hand, and individual States desiring federal administration of SSI supplementary benefits on the other, is conducted in substantial part on the basis of the general terms and conditions established by HEW. These general terms and conditions (sometimes called "model agreements") are in turn related to

published regulations of HEW. Both the regulations and the general terms and conditions should be developed by a procedure that embraces both (a) discussions with a representative committee of State officials, of the type that led to agreement on successive versions of the general terms and conditions in 1973, 1974, and 1976, and (b) the notice and public comment procedures of 5 U.S.C. § 553. The notice of proposed rulemaking (or, in appropriate cases, an advance notice of proposed rulemaking) should precede the discussions with the committee of state representatives. This does not necessarily imply an added cycle of notice and public comment nor any diminution of HEW's flexibility in negotiation.

Since the current general terms and conditions have never been the subject of notice and public comment, and include several areas noted in Recommendations 2 and 3 below in which procedural improvements can be achieved, HEW should initiate a full review of them, utilizing the above procedures.

The recommendation is not that "notice and comment" replace the sort of "negotiation" that took place between a state contract committee and the Social Security Administration in 1973 and 1974 and 1976, but rather that it supplement such a process. Under recently established HEW procedures for issuing regulations, such methods of soliciting the views of directly interested parties are encouraged and in some cases required.[236] Since, in most instances, it should be possible to revise both the regulations governing the agreements and the model agreements simultaneously, the recommendation makes clear that it does not necessarily imply a double cycle of notice and public comment (first for the regulations, then for the model agreements).

2. *Post-Agreement Disputes*

The amount of post-agreement controversy is, in large part, a function of the adequacy of the other agreement terms. At least two problems with the original Model Agreements were responsible for disputes that, with benefit of hindsight, it appears might have been avoided. Both pertain to measurement of the final division of liability for supplementary payments between state and Federal government. First, having the Federal government's liability for errors rest on a case by case identification of errors by the states created a situation in which the data for liability determination was hard if not impossible to obtain. That resulted in massive delays and in most cases rich ground for disagreement. The determination of liability according to the findings of the Social Security Administration's Quality Assurance review, specified by the Agreements for periods beginning in

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[236] *See* 43 Fed. Reg. 23,119 (1978).

Assurance review, specified by the Agreements for periods beginning in 1975, had the advantage of substituting data that were routinely collected and promptly available to assist final settlement. The difficulty with that approach is that the states, in general, have lacked confidence in the measurement process. Moreover, states seem particularly to be upset by Federal policies or consistent practices which, to them, seem a violation of statute, regulation, or agreement. Yet under the current agreements such policies or practices are lumped together with all other "errors."

> Recommendation 2: Consideration should be given through such procedures [those outlined in Recommendation 1] to a new agreement provision for measuring the respective liabilities of the federal government and of the States. In formulating such new provision, specific consideration should be given to (a) inclusion of liability standards and measurement systems that are generally acceptable to the States, (b) explicit establishment of the right of a State to seek any adjustment of liability that its own data (derived through the generally accepted systems) may indicate, with recourse to the contractual disputes procedure in the event SSA declines adjustment on the basis of such State data, and (c) possible procedures for separate treatment of liability for errors resulting from consistent SSA practices or policies that violate statute, regulation or agreement, as distinct from liability for random errors in general.

Once disputes arise, some though seemingly not all, are dealt with by the Model Agreements' "disputes paragraph." Recent studies of similar clauses used in procurement contracts have urged that their scope be expanded to encompass all disputes concerning contract performance.[237] The argument has even greater force with these agreements because of the limited number of adjustment provisions they contain compared to the typical procurement contract.

One significant source of dispute less than adequately addressed by the present Model Agreement terms is Federal agency treatment of state failures to comply with the statute, regulation, or agreement. The only certain remedy is a termination of the agreement under certain circumstances, or suspension of payments, depending on the type of alleged non-compliance. The current "disputes" paragraph is not well shaped to deal with such issues of compliance raised by the Social Security Administration.

Once a matter has been considered by the Commissioner of Social Security or his designee, under the disputes article, the next and last step should be a full hearing before an independent, reasonably expert decisionmaking body. The current Model Agreements fail to assure that, yet they purport to bind the states (subject to Wunderlich Act limitations) to the final administrative determination. By virtue of the recent regulation creating jurisdiction over all redeterminations of grant-in-aid program disallowances in the HEW Grant Appeals Board there is reason to believe that it may grow into the sort of body described above—an administrative tribunal in which the states may have sufficient confidence to warrant "agreeing" to give its decisions finality.

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[237] The Commission on Government Procurement recommended:

> Empower contracting agencies to settle and pay, and administrative forums to decide, all claims or disputes arising under or growing out of or in connection with the administration or performance of contracts entered into the United States.

4 *Procurement Commission Report* 22 (1972).

> Recommendation 3: On the assumption that the agreements will continue to contain a provision granting dispute resolution authority to an official or officials in HEW, the provision should be amended (a) to encompass, without doubt or ambiguity, all disputes between the parties concerning performance of their respective obligations arising out of the agreement—including federal claims of State non-compliance, (b) to assure prompt resolution of all disputes submitted pursuant to its terms, and (c) to provide that the last stage of the administrative dispute process is to be before the HEW Departmental Grant Appeals Board, which shall render an independent decision, based on a hearing and the record.

While there are some troubling uncertainties about the availability of judicial review at a few critical points of this new Federal-state arrangement, no recommendations for Social Act amendments to deal with the question seemed called for at this point. Tucker Act jurisdiction would appear to assure states of a judicial determination on questions that ultimately resolve to questions of liability. The uncertainty about the availability of nonmonetary relief in Federal district court is just that—an uncertainty. Such relief may well be available despite the "contractual" arrangement. With the recommended expansion of the disputes clause to cover all instances of Federal non-compliance and addition of a liability term which establishes Federal liability for policies or consistent practices which violate the agreement terms, the need for nonmonetary relief may in any event be substantially diminished if not, as a practical matter, removed.

[1976 Revision]

AGREEMENT NO. 3—FEDERALLY ADMINISTERED MANDATORY MINIMUM SUPPLEMENTS AND SUPPLEMENTARY PAYMENTS (OPTIONAL)

SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

(Agreement with the State Pursuant to Section 1616 of the Social Security Act and Section 212 of P.L. 93-66)

AGREEMENT BETWEEN

The Secretary of Health, Education, and Welfare

AND

The State of ________

The Secretary of Health, Education, and Welfare, hereinafter referred to as the Secretary and the (State Agency), hereinafter referred to as the State, pursuant to section 1616 of the Social Security Act (providing for Federal administration of optional State supplementary payments to individuals who are receiving or who would but for their income be eligible to receive Federal Supplemental Security Income Payments), and pursuant to section 212 of P.L. 93–66 hereby agree to the following:

ARTICLE I. DEFINITIONS

For purposes of this agreement—

A. The term "Secretary" means the Secretary of Health, Education, and Welfare or his delegate.

B. The term "State" means the (State Agency), including any local, county, or other jurisdiction thereof.

C. The term "Act" means the Social Security Act.

D. The term "supplementary payment" means the money payment determined to be payable by the Secretary on behalf of the State in accordance with section 1616 of the Social Security Act.

E. The term "mandatory minimum supplement" means the money payment required by the provisions of section 212 of P.L. 93–66 and P.L. 93–233.

F. The term "basic Federal payment" means the money payment required by section 1611 of the Act, section 211 of P.L. 93–66 and P.L. 93–233.

G. The terms "eligible individual," "eligible spouse," "aged individual," "blind individual," and "disabled individual" shall have the same meaning as they have when used in title XVI of the Act, P.L. 93–233, and in regulations promulgated thereunder by the Secretary.

H. The terms "essential person," "qualified individual," "December 1973 income," and "title XVI benefit plus other income" shall have the same meaning as they have when used in sections 211 and 212 of P.L. 93–66, P.L. 93–233, and in regulations promulgated thereunder by the Secretary.

I. The term "Supplemental Security Income Program" means the Federal program of Supplemental Security Income for the Aged, Blind, and Disabled established by P.L. 92–603, and amended and modified by P.L. 93–66 and P.L. 93–233.

J. The term "Unprotected Payment" has the same meaning as it has when used in subpart T of part 416 of chapter III of title 20 of the Code of Federal Regulations.

K. The term "regulations" means those regulations promulgated by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 551 et seq..

L. The term "fiscal year" means the year beginning October 1 and ending September 30 the following calendar year. The first such fiscal year begins on October 1, 1976.

ARTICLE II. FUNCTIONS TO BE PERFORMED BY THE SECRETARY

The Secretary shall:

A. On behalf of the State, make determinations of eligibility for supplementary payments with respect to individuals residing in the State who are or will be receiving (or would but for their income be eligible to receive) basic Federal payments, and make determinations of eligibility for mandatory minimum supplements pursuant to the terms of this agreement with respect to any individual certified by the State to the Secretary pursuant to Article III.

B. On behalf of the State, make such supplementary payments or mandatory minimum supplements (whichever are higher) to individuals determined to be eligible to receive such payments in such amounts and at such times as prescribed by the terms of this agreement.

C. On behalf of the State, establish the amount of such supplementary payments or mandatory minimum supplements in accordance with the terms of this agreement.

D. Maintain records of individuals eligible for and receiving State supplementary payments or mandatory minimum supplements.

E. Provide individuals reasonable notice and opportunity for a hearing with respect to any adverse decisions as to the rights of such individuals to receive such supplementary payments, or mandatory minimum supplements, or both.

F. Subject to verification by the Secretary and any required opportunity for hearing before suspension, reduction or termination of benefits, take action as promptly as feasible to determine and pay the correct amount of supplementary payments or mandatory minimum supplements following receipt of notice from the recipient, the State, or any political subdivision thereof concerning a change in living arrangements, income, or other factors which may affect a recipient's amount of such payments or supplements.

G. Receive, disburse, and account to the State for State funds in making such supplementary payments and mandatory minimum supplements and furnish the State monthly Financial Accountability Statements. Upon the State's request, the Secretary shall, no later than January 1, 1977, provide monthly case-by-case accounting data with respect to the automated disbursements, including such monthly accountability statements (SSA-8700) received by the State for periods beginning on or after October 1, 1976. It is the intention of both parties that as soon as feasible all aggregate items appearing on the Financial Accountability Statements subsequent to the time that it is feasible shall be accompanied by or reconcilable to supporting data which shall include automated and manual disbursements, collections by withholding, by cash refunds, by returned checks or any other means, and any other element used in computing total expenditures, such as postentitlement adjustments and miscellaneous expenditures.

H. Conduct studies and evaluations of the supplementary payment program and mandatory minimum supplement program which the Secretary determines to be necessary to ensure effective and efficient administration of the supplemental security income program, at the Secretary's expense, and provide full and prompt reports thereon to the State. The Secretary shall also conduct such studies or evaluations as the State reasonably requests which he determines to be feasible. If the Secretary performs such studies, the State shall bear the costs thereof, unless the Secretary finds that such studies or evaluations are in the interest of effective and efficient administration of the supplemental security income program. It is agreed that this provision is to be excluded from the disputes procedures specified in Article VI, Paragraph D.

I. Establish procedures to detect and investigate potential fraud or program abuse cases and make prompt reports to the State on such cases. This provision shall be understood not to preclude the Secretary from taking appropriate action where the fraud or abuse may constitute an offense committed against the United States.

J. Establish effective procedures to ascertain the incidence of payments to ineligibles and erroneous payments to eligible recipients and make prompt reports to the State on such payments.

K. Impose, as promptly as is feasible, deductions against supplementary payments or mandatory minimum supplements, if any are validly prescribed by the State on eligible individuals or eligible spouses for failure to comply with the reporting requirements established by the Secretary.

L. Perform such other functions as may be required by regulations or by the Secretary and the State through a written modification of this agreement which may be necessary to carry out the provisions of this agreement.

M. If the State so requests, clearly indicate either by a separate notice accompanying each Federal check issued in making a supplementary or mandatory minimum supplement or on the face of each such check the fact that State funds are a part of the payment or the amount of the check representing State funds; the choice of alternatives under this section M being with the Secretary.

ARTICLE III. FUNCTIONS TO BE PERFORMED BY THE STATE

The State:

A. Shall provide to the Secretary the name and mailing address of each individual residing in the State who is an aged, blind, or disabled individual and for the month of December 1973 was eligible to receive and did receive for such month aid or assistance, in the form of money payment, pursuant to a State plan in effect for the month of June 1973, and approved under title I, X, XIV, or XVI of the Act, including any individual who makes application prior to January 1, 1974, and is subsequently found to be eligible for a money payment with respect to all or any portion of the month of December 1973 under such approved State plan. The State will process and make a determination of eligibility on all such cases.

B. Shall provide to the Secretary the amount of the December 1973 income of each individual described in paragraph A above. Such income may be reduced, at the option of the State, in accordance with the provisions of section 10 of P.L. 93–233 and regulations promulgated thereunder.

C. Shall provide to the Secretary, on its own initiative or at the Secretary's request, the amount of income which must be considered in determining the mandatory minimum supplement for any month after December 1973 of each individual described in section A above in order for the Secretary to perform his acquired functions under the agreement.

(If the State elects not to apply these deductions, then delete the following provision.)

D. Shall furnish the Secretary with any changes in the special needs or circumstances of individuals entitled to the mandatory minimum supplement whose December 1973 income included an amount payable solely due to special needs or circumstances, and if such change had occurred in December 1973 would have caused a reduction in the amount of aid or assistance such individual would have received for December 1973.

E. Shall provide a list to the Secretary of the names of individuals and their titles who are authorized to act on behalf of the State with respect to matters covered under this agreement. The State shall keep such list current.

F. Shall provide the Secretary with such additional data at such times as the Secretary may reasonably require in order to properly, economically, and efficiently carry out his functions under this agreement. If the State desires reimbursement by the Secretary pursuant to Article VIII–B of this agreement, the State shall obtain the written consent of the Secretary before performing such other functions under this section.

G. Shall make payments to the Secretary in accordance with Article VI.

H. Shall comply with regulations promulgated by the Secretary relating to the terms and conditions under which supplementary payments and mandatory supplements are payable; provided however that in the event any such regulation is promulgated during the term of this agreement the State shall have the right to terminate this agreement upon 45 days written notice to the Secretary which must be given within 30 days of the effective date of such regulation. The State shall, however, comply with any such regulation until the effective date of such termination. With respect to regulations which alter specific Federal and State responsibilities for administration and fiscal responsibilities as stipulated in this agreement, promulgated during the term of this agreement, the State shall not be required to comply therewith until the agreement is extended or renewed for any additional period or periods. The State and Secretary may mutually agree, however, to comply with any such regulation during the current agreement period.

I. Shall perform such other functions as the State may deem necessary to carry out the provisions of this agreement. If the State desires reimbursement by the Secretary pursuant to Article VIII–B of this agreement, the State shall obtain the written consent of the Secretary before performing such other functions in this section.

J. In determining the amount of reimbursement of indirect costs related to functions approved by the Secretary, the State shall use the State's administrative cost allocation plan approved by the cognizant Federal agency.

ARTICLE IV. STATE AUDIT/STATE QUALITY ASSURANCE

A. The Secretary recognizes the right of the State (including its authorized representatives) to conduct audits and in connection with any such audit, to examine any pertinent books, documents, papers, or records of the Secretary related to payment and denial of claims and to expenditures made by the Secretary on behalf of the State for State supplementary payments and mandatory minimum supplements. The audit shall be at State expense except that those books, documents, papers, or records customarily provided free of charge for audit purposes shall be so provided by the Secretary. No such audit shall extend to any inquiry into the Secretary's administrative or operational activities and practices. The results of such audits shall not be used for determining FFL for erroneous payments. The State shall initiate its request to conduct any audit no later than 1 year from the close of the fiscal year to be audited. The audit shall be completed within 3 years of the close of the fiscal year to be audited. The Secretary and the State further agree that there shall be a cooperative exchange of audit working papers between the HEW Audit Agency and the State. The State may elect to conduct its own audit, to participate in a joint audit with other States, or to have an independent public accountant represent the State in conducting such audit. The Secretary shall, within 60 days after the State notifies the Secretary of its intention to conduct any audit, propose a reasonable time and place for the conduct of the audit.

B. If in conducting its own quality assurance review the State desires access to the Secretary's records, the State may perform a quality assurance review on a sample of cases selected by the State from the SSI quality assurance sample provided that such review is coordinated and conducted simultaneously or concurrently with the quality assurance review of the same cases performed by the Secretary. The Secretary and the State shall cooperate in arriving at the time for conducting their respective samples. Such sample review performed by the State shall be at State expense.

C. Neither the results of the State audit nor of the quality assurance review by the State shall be used as a basis for assigning fiscal liability determinations except as may be agreed to by the Secretary.

ARTICLE V. AMOUNT OF AND PAYMENT OF SUPPLEMENTARY PAYMENTS AND MANDATORY MINIMUM SUPPLEMENTS

A. Payments shall be made monthly by the Secretary.

B. The Secretary may make payments under this agreement to the eligible individual, or such individual's eligible spouse, or partly to each or to any such other person including an appropriate public or private agency (representative payee), which he determines is interested in or concerned with the welfare of such individual (or spouse) in accordance with the provisions of section 1631(a) (2) of the Act. Where the Secretary selects a representative payee to receive the basic Federal payment, if any, the same representative payee shall be selected to receive the supplementary payment or mandatory minimum supplement, or both, on behalf of such individual.

C. The amount of supplementary payments shall be determined in accordance with Article I of Appendix A of this agreement and eligibility with respect thereto shall be determined in accordance with title XVI of the Act and regulations promulgated thereunder.

D. The amount of mandatory minimum supplements which shall be paid for any individual referred to in Article II of this agreement shall be equal to the amount by which the individual's December 1973 income exceeds the amounts of his title XVI benefits plus other income for such month (or such greater amount as the State may specify in Appendix A of this agreement); provided, however, that the mandatory minimum supplement paid to any individual for whom a change is reported pursuant to section D of Article III shall be reduced by an amount equal to the amount by which the amount of aid or assistance such individual would have received for December 1973 would have been reduced if such change had occurred in December 1973, provided further, that the mandatory minimum supplement may be reduced based on such reported change by such lesser amount as the State may specify.

E. No mandatory minimum supplement or supplementary payment shall be payable to an individual for any month after:

1. The month in which the individual dies, or
2. The first month in which such individual ceases to be an aged, blind, or disabled individual as defined in section 1614 of the Act.

F. No mandatory minimum supplement or supplementary payment shall be payable to an individual for any month:

1. In which such individual was ineligible to receive a basic Federal payment under title XVI of the Act by reason of the provision of section 1611(e)(A), (2), or (3), 1611(f), or 1615(c) of such Act, or
2. For which such individual is not a resident of the State.

G. For purposes of this agreement, an individual will cease to reside in a State if he leaves the State with the present intention to abandon his home there. In the absence of evidence to the contrary,

1. If an individual leaves the State for a period of 90 calendar days or less, his absence from the State will be considered temporary and he will be considered to continue to reside in such State; and
2. If an individual leaves the State for a period in excess of 90 calendar days, he will no longer be considered to reside continuously in such State.

ARTICLE VI. STATE FUNDING AND FINAL SETTLEMENTS

A. Until the amount specified in section B of Article II of Appendix A of this agreement is reached in any fiscal year, the State shall pay monthly to the Secretary, on or before the date payment is to be received in the month by recipients, or 5 days after delivery to the State, of the SDX payment data file issued in conjunction with the monthly SSI treasury tape, whichever is later, an amount equal to the expenditures made by the Secretary as supplementary payments and mandatory minimum supplements for that month as specified in Article V hereof. Such amount shall reflect adjustments, if any, made by the Secretary including adjustments for accounting errors to the extent that they have been identified by audit or other means and verified by the Secretary. Thereafter, the State shall only pay for each remaining month in the fiscal year the total of the Unprotected Payments which are payable for such month and such payments shall be made in accordance with the same time schedule described in the preceding sentence. *Notwithstanding the foregoing provisions of this section, the State may elect to pay monthly during each fiscal year an amount equal to one-twelfth of the total non-Federal share of expenditures for aid or assistance for calendar year 1972 as specified in section B, Article II of Appendix A, plus the Unprotected Payments which are payable for such month.*

B. As soon as possible after the close of the fiscal year, the Secretary shall submit a statement to the State showing total amounts expended as supplementary payments and mandatory minimum supplements by the Secretary on behalf of the State during the fiscal year, the State's total liability therefor, and the end-of-year balance of the State's cash on deposit with the Secretary (if any). Any such balance shall be applied as a credit against the State's liability for future expenditures made by the Secretary under this agreement. If for such fiscal year the Secretary's statement to the State shows a deficit, the State shall thereupon include an amount equal to such deficit in its payment to the Secretary for expenditures made by the Secretary for the next succeeding month following receipt of the statement.

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* The clause between the asterisks is optional and may be used by the State.

C. As soon as possible after the submission of the statement referred to in section B above, negotiations on a final determination of State liability for supplementary payments and mandatory minimum supplements paid on behalf of the State in the fiscal year shall be undertaken by the Secretary and the State. A closing agreement with respect to the State's liability upon which the State and the Secretary agree shall be incorporated into a memorandum signed by the Secretary and the State, and such closing agreement shall constitute a final determination of total liability of the State for that fiscal year.

D. If the Secretary and the State are unable to agree upon any matter in dispute arising under this agreement, the State may request the Associate Commissioner for Program Operations, SSA, to make an initial determination. Within 90 days from the receipt of such request, the Associate Commissioner for Program Operations, SSA, or his designee, shall make an initial determination in writing with a full explanation thereof, or provide written notification of the reason such determination cannot be made, what further information or actions by the parties may be required, and within what time period a determination is expected to be made. This determination shall be final and conclusive unless within 30 days the State appeals to the Commissioner of Social Security to reconsider the initial determination. Within 90 days the Commissioner shall inform the State, in writing, of his determination with a full explanation thereof, or provide written notification of the reasons such determination cannot be made and what further information or actions by the parties may be required. This determination shall be final and conclusive unless the State files a written appeal to the Secretary within 30 days. If the State appeals the Commissioner's determination, the Secretary shall review and render a decision affirming, modifying, or reversing such determination. In notifying the State of his decision, the Secretary shall state the basis thereof. In connection with the Secretary's review, the parties shall be afforded an opportunity to be heard and to offer evidence in support of their positions before the Grant Appeals Board of the Department of Health, Education, and Welfare. Pending the decision of the Secretary, the State and the Secretary shall proceed diligently with the performance of this agreement.

Nothing in this agreement shall be construed to waive the State's right to seek judicial review by a court of competent jurisdiction of both findings of fact and conclusion of law contained in the Secretary's decision, or to enforce its rights under this agreement by any available remedies. Nothing in this agreement shall be construed as waiving the Secretary's right to assert lack of jurisdiction with respect to any suit brought under this agreement, or to enforce the Secretary's rights under this agreement by any available remedies.

E. After the final determination of the fiscal liability of the State for the fiscal year either by mutual agreement between the Secretary and the State, or after application of the provisions of section D of this article, the Secretary and the State shall make such adjustments as may be necessary in accordance with the provisions of the following subsections:

1. If for the fiscal year the amount of funds reimbursed by the State, as specified in this article, is in excess of the amount of such final determination of liability, the Secretary shall apply such excess as a credit toward subsequent monthly payments, or, if there are no funds presently due the Secretary by the State under the agreement, the Secretary shall, upon request of the State, refund such excess to the State within 90 days.
2. If for the fiscal year the amount of funds reimbursed by the State, as specified in this article, is less than the amount of such liability, the State shall pay the difference to the Secretary within 90 days.

ARTICLE VII. CONFIDENTIAL NATURE AND LIMITATION ON USE OF INFORMATION AND RECORDS

The Secretary and the State shall adopt policies and procedures to ensure that information contained in their respective records and obtained from each other or from others in carrying out their functions under this agreement shall be used by them and disclosed solely as provided in section 1106 of the Act and the regulations promulgated thereunder.

ARTICLE VIII. ADMINISTRATIVE COSTS

A. It is the general intent of this agreement that the Secretary, in performing his functions and duties under this agreement, shall (subject to Article II of Appendix A) be paid by the State only an amount equal to the amounts paid by the Secretary as supplementary payments and mandatory minimum supplements on behalf of the State. The cost of administration incurred by the Secretary in carrying out his functions under this agreement shall constitute cost to the Secretary subject to the application of Article II H hereof.

B. Administrative expenses incurred by the State which shall be reimbursed by the Secretary are limited to expenses incurred in performing the functions specified in Article III (A), (B), (C), (D), (F), and (I) and any functions of the Secretary which relate solely to mandatory minimum supplement and State supplementary payment processes which the Secretary requests the State to perform. Notwithstanding the foregoing, the State shall not be reimbursed for any activity related to the determinations of an optional supplement variation as identified in Appendix A. In addition, the costs of furnishing the Secretary with data related to current State programs (or such programs of political subdivision thereof), e.g., established under the Social Security Act, the General Assistance programs, or the Food Stamp program, shall not be reimbursed under this agreement. These expenses shall be reimbursed by the Secretary not less frequently than quarterly, or funded through the general letter of credit if such Department of Health, Education, and Welfare letter of credit is available to the State for funding other programs, on the basis of the cost principles set forth in subpart 1-15.7 of part 1-15 of the Federal Procurement Regulations (41 CFR 1-15.7) in effect as of the date of this agreement. Except as provided in section D below, reimbursement shall be made within 90 days after receipt of the quarterly report, SSA-8713. The costs are subject to audit by the Secretary. Reports of the audit will be released by the Secretary's audit agency simultaneously to program officials of the Department and to cognizant State officials. If the audit results in exceptions, the State and the Secretary shall seek to negotiate the differences.

C. The State shall submit its budget request to the Secretary for reimbursable administrative costs for the term of this agreement in such manner as may be requested by the Secretary by July 15 of the fiscal year preceding the fiscal year to which such budget pertains. Provided, however, that the State may submit its budget request at such later date that the Secretary specifies for fiscal year 1977. After considering all pertinent information, the Secretary will determine the amount of funds that are necessary for the State to carry out its performance of the reimbursable work under this agreement (specified in paragraph B). The Secretary will, within 60 days from the State's submission of its budget request, notify the State of the amount which will be made available to it. The State agrees to use its best efforts to perform its functions within the amount approved by the Secretary. If at any time the State has reason to believe that the costs which it expects to incur in its performance hereunder will exceed the amount approved by the Secretary, it shall notify the Secretary, in writing, to this effect, giving its revised estimate of such total cost. The Secretary will provide the State with the additional amount needed by the State for reimbursement of administrative costs for activities required and approved by the Secretary. After the close of the fiscal year, the State shall submit a report of total expenditures made (and obligations incurred) for such period. Negotiations on a final determination of costs shall commence promptly after audit or upon acceptance of the report by the Secretary for such purposes. A closing agreement with respect to such final determination shall be incorporated into a memorandum signed by both parties, and shall constitute a final cost settlement for the fiscal year. Financial adjustments, if necessary, shall be made in the same manner as provided for in section E of Article VI.

D. If the Secretary and the State are unable to agree upon any matter in dispute relative to administrative costs, the final determination of reimbursable administrative costs shall be achieved through the procedures set forth in section D, Article VI, of this agreement. The Secretary will provisionally pay all claimed amounts not in dispute, subject to audit and settlement after the close of the agreement period.

ARTICLE IX. FEDERAL LIABILITY FOR ERRONEOUS PAYMENTS

The parties take notice that the Secretary and the States are endeavoring to jointly develop a new system or systems for assuring comparable principles of quality performance under the program of Aid to Families with Department Children (AFDC), the SSI program, and other related means-tested programs. It is recognized that as a result of such endeavors, and after recommendations flowing therefrom, the Secretary will in due course promulgate regulations establishing a new system or systems of quality assurance for AFDC, SSI, and/or other programs. The provisions set forth in this article for determining Federal liability for erroneous SSI payments shall apply until the final date of publication or effective date, whichever is later, of any such regulations affecting the SSI program. At the time such final regulations are promulgated by the Secretary, the parties shall renegotiate the provisions for determining Federal fiscal liability for erroneous SSI payments in accordance with such regulations. The new provisions so negotiated shall be effective retroactive to final date of publication, or effective date, whichever is later, of the regulations promulgated by the Secretary. Until the parties agree on provisions in accordance with the regulations, Federal liability for erroneous SSI payments shall apply only for periods to the final date of publication or effective date of regulations, whichever is later.

A. For the period beginning January 1, 1974, and ending December 31, 1974, the Secretary shall be liable for any State-funded supplementary payments and mandatory minimum supplements made on behalf of the State which are erroneously paid to any individual provided that:

1. Any such erroneous payment is identified on an individual basis. This provision will apply only to cases identified or discovered during quality assurance reviews or reported by the State in writing and verified by the Secretary.
2. The data furnished to the Secretary as conversion data were adequate to make the determination of eligibility for the mandatory minimum supplement or the supplementary payment. If upon redetermination these data are found to be erroneous and do not support such original determinations of eligibility, then the State shall be liable for any erroneous mandatory minimum supplement or supplementary payment which occurs between the time of the State furnishing the erroneous data and the first redetermination by the Secretary.
3. The Secretary shall not be liable for any erroneous payment if such payment is based upon erroneous initial payment data (with respect to mandatory minimum supplements certified by the State), erroneous amounts of income which must be considered in determining the mandatory minimum supplements, or caused by changes in circumstances of individuals and recomputations of minimum income level amounts which the State erroneously reported or failed to report to the Secretary.
4. For purpose of this section A, the term erroneous payment means any payment made to an ineligible individual and/or any overpayment to an eligible individual (as such terms are hereinafter defined).

B. Thereafter, the Secretary's liability for any State-funded mandatory minimum supplement or supplementary payment made on behalf of the State which was erroneously paid to any individual shall be determined in a manner similar to that for determining the State's liability for erroneous payments made to ineligible recipients and for overpayments, as provided for in 45 CFR 205.40 and 45 CFR 205.41 (the Social and Rehabilitation Service's regulations applicable to the State's program of Aid to Families with Dependent Children). However, if the Secretary makes a formal determination that the State is not in compliance with the provisions of 45 CFR 205.40 and 45 CFR 205.41 with respect to the State's program of Aid to Families with Dependent Children for any 6-month period set out in this article, then the Secretary shall not be liable to the State for erroneous payments of State supplementation for such 6-month period. In determining the Secretary's liability, there shall be established a base period beginning July 1, 1974, and ending December 31, 1974. During such base period the Secretary shall compile accurate data for such period to establish the incidence of, and costs associated with, State funded mandatory minimum supplements and supplementary payments provided to ineligible individuals and overpayments to eligible individuals. The data for this period shall provide a standard against which such subsequent activities by the Secretary to reduce errors will be measured. After the base period there shall be excluded from State payments of State funded mandatory minimum supplements and supplementary payments to the Secretary for his use in making such mandatory minimum supplements and supplementary payments of State funds on behalf of the State to individuals eligible thereto the proportions of the State expenditures of such payments for ineligibles or for overpayments represented by the following percentages of cases in error:

1. With respect to payments to ineligible individuals for the 6-month period commencing:

a. January 1, 1975, one-third of the difference between the Secretary's rate of ineligibility cases for the period July 1, 1974, to December 31, 1974, and 3 percent;

b. July 1, 1975, two-thirds of such difference;

c. January 1, 1976, all of such difference.

1.1 With respect to the period commencing July 1, 1976, and ending September 30, 1976, error rate data, relating to payments to ineligible individuals, derived through quality assurance reviews shall be obtained by sampling the period from July 1, 1976, through December 31, 1976. Such error rate data from the whole of such sampling period shall be applied to State funded mandatory minimum supplements and supplementary payments expended in the period July 1, 1976, through September 30, 1976, to determine Federal fiscal liability for payments to ineligible individuals with respect to that period.

1.2. With respect to payments to ineligible individuals for the 6-month period commencing October 1, 1976, and successive subsequent 6-month periods, all of the difference between the Secretary's rate of ineligibility cases for such period and 3 percent.

2. With respect to overpayments for the 6-month period commencing:

a. January 1, 1975, one-third of the difference between the Secretary's rate of overpayments in the eligible caseload for the period July 1, 1974, to December 31, 1974, and 5 percent;

b. July 1, 1975, two-thirds of such difference;

c. January 1, 1976, all of such difference.

2.1. With respect to the period commencing July 1, 1976, through December 31, 1976. Such error rate date from the whole of such sampling period shall be applied to State funded mandatory minimum supplements and supplemetary payments expended in the period July 1, 1976, through September 30, 1976, to determine Federal fiscal liability for overpayments with respect to that period.

2.2. With respect to overpayments for the 6-month period commencing October 1, 1976, and successive subsequent 6-month periods, all of the difference between the Secretary's rate of overpayments in the eligible caseload for such period and 5 percent.

3. In addition:

a. If the Secretary's rate of ineligible cases or overpayments for any such 6-month period exceeds that for the period July 1, 1974, to December 31, 1974, the difference between such rates.

b. Until the date the Secretary performs the first redetermination, or July 1, 1975, if later, the Secretary shall not be liable for any erroneous payment to inelibible individuals or for any overpayment to any eligible individual if such erroneous payment or overpayment is based upon incorrect conversion data or initial payment data (with respect to mandatory minimum supplements certified by the State).

c. The Secretary shall not be liable for any erroneous payment to ineligible individuals or for any overpayment to any eligible individual if such erroneous payment or overpayment results from erroneous amounts of income which must be considered in determining the mandatory minimum supplement, or caused by changes in circumstances of individuals and recomputations of minimum income level amounts erroneously reported or not reported to the Secretary by the State.

C. The amount of such erroneous payments to ineligible individuals or overpayments to eligible individuals for which the Secretary is liable shall be excluded for purposes of applying the "hold-harmless" provision of section 401 of P.L. 92–603.

D. The Secretary shall, nevertheless, undertake recovery, adjustment or recoupment of any such erroneous payments to ineligible individuals or overpayments to eligible individuals pursuant to regulations adopted by the Secretary with respect to overpayments of basic Federal payments.

E. For purposes of this article:

1. An ineligible individual is a person who, if a correct determination had been made in his case, would not have received any payment (basic Federal payment or mandatory minimum supplements or supplementary payments) or part or parts thereof under the supplemental security income program; and

2. An overpayment to an eligible individual is the amount paid to an individual, who, if a correct determination had been made in his case, would have received a lesser payment than the amount actually paid less the amount of such lesser payment. An erroneous payment of less than $5.00 shall, for purposes of this article, not be considered an overpayment.

F. Nothing in section B of this article shall be construed as waiving the State's objection to the imposition by the Secretary of the fiscal sanctions provided for in 45 CFR 205.40 and 205.41.

ARTICLE X. TERM OF AGREEMENT

This agreement shall begin on October 1, 1976, and end on September 30, 1977. It will automatically be renewed for successive periods of one year unless the State or the Secretary gives written notice not to renew at least 90 days before the end of the then current period.

ARTICLE XI. TERMINATION AND MODIFICATION OF AGREEMENT

A. The State or the Secretary may terminate this agreement at any time upon 90 days written notice to the other party provided the effective date of the termination is the last day of a quarter.

B. This agreement may be modified at any time by a written modification mutually agreed upon by the parties hereto.

C. If this agreement is terminated by the State in any manner, including nonrenewal, the provisions of sections F through J of this article shall apply.

D. Nothing in this agreement shall be construed to preclude the Secretary from terminating this agreement in less than 90 days if the State fails to materially comply with the terms of sections A, B, C, or G of Article III of this agreement and fails to cure such noncompliance, or fails to request an opportunity to show cause why such agreement should not be terminated, within a period of 30 days (or such longer period as the Secretary may allow) after provision by the Secretary of notice explaining the grounds for the proposed termination. If the State fails to comply with paragraph G of Article III of this agreement, the Secretary may immediately suspend making further supplementary payments and mandatory minimum supplements pursuant to Article II-B of this agreement, provided that the cumulative amount of the unpaid funds by the State is greater than one-third of the total amount which was paid by the State for the calendar quarter immediately preceding the month in which the State does not make payment as required by paragraph G of Article III.

(If the State has signed Agreement No. 1, then delete the following provision.)

E. If this agreement is terminated by the State or Secretary in any manner, including nonrenewal under Article X, the State will thereafter be precluded from eligibility for Federal payments pursuant to title XIX for any quarter beginning after the effective date of termination or nonrenewal; provided, however, that if the State thereafter elects to administer its own mandatory minimum supplement program and executes an agreement with the Secretary to carry out such a program, the State would retain its eligibility for title XIX payments.

F. In the event of termination under this article, the Secretary will discontinue all State supplementary payments and mandatory minimum supplements to recipients on the effective date of termination. The Secretary shall notify the State of underpayments of State supplementary payments and mandatory minimum supplements to recipients which occured prior to termination.

G. Within 90 days following termination the Secretary will provide the State with a final Financial Accountability Statement (SSA-8700). If this statement reflects a balance in favor of the State, payment will be made to the State promptly. If this statement reflects a balance in favor of the Secretary, the State will promptly pay the amount to the Secretary. These payments constitute a tentative reconciliation pending final settlement.

H. For a period of one year following the effective date of termination the Secretary will continue to make adjustments to Federal/State accounts where an incorrect distribution of State and Federal funds occurred in the payment to the recipient prior to termination. The Secretary shall also credit the State account for overpayments recouped during this one year period. Negotiations on a final determination of State liability for supplementary payments and mandatory minimum supplements paid on behalf of the State in the agreement period terminated, and for recoupments, and adjustments between Federal/State accounts in the one year following termination shall be undertaken by the Secretary and the State one year after issuance of the final Financial Accountability Statement.

I. The Secretary and the State agree that, both prior and subsequent to the closing agreement (section J below) only the Secretary will undertake to recoup overpayments to recipients made by the Secretary. The Secretary shall credit the State account for overpayments recouped during the one year following termination of the agreement.

J. A closing agreement with respect to the State's liability upon which the State and the Secretary agree shall be incorporated into a memorandum signed by the Secretary and the State, and such closing agreement shall constitute a final determination of the total liability of the State. If such liability exceeds payments made by the State, the State shall promptly pay the difference to the Secretary. If payments made by the State exceed such liability, the Secretary will promptly refund to the State the excess amount.

K. If the State and the Secretary are unable to agree upon a final determination of the total liability of the State, the final determination of such liability shall be achieved through the procedures set forth in section D of Article VI.

L. Notwithstanding the provisions of sections F through J of this article, the mechanisms set forth in Article IX of this agreement shall provide the basis for assigning fiscal liability for erroneous payments.

ARTICLE XII. EXAMINATION OF STATE RECORDS

The State agrees that the Secretary and the Comptroller General of the United States (including their duly authorized representatives) have access to and the right to examine any directly pertinent books, documents, papers, and records of the State for purpose of verifying: administrative costs paid by the Secretary to the State, the amount of Adjusted Payment Levels, calendar year 1972 non-Federal expenditures, and establishment or recalculations of Minimum Income Levels and countable income.

(If the State has signed Agreement No. 1, Article XIII must be inserted.)

ARTICLE XIII. OTHER AGREEMENTS

The Secretary and the State have previously entered into an agreement under section 212(a) of P.L. 93-66. For so long as this agreement remains in effect, it shall supersede the prior agreement. In the event this agreement is terminated in any way (including nonrenewal) the prior agreement shall be restored to full force and effect.

ARTICLE XIV. LIMITATION OF LIABILITY

The Secretary shall not be responsible for any financial loss incurred by the State, whether directly or indirectly, through the use of any data by the State furnished pursuant to this agreement.

ARTICLE XV. APPENDICES

Appendix A (Determination of Supplementary Payment Amounts and Limitation of Fiscal Liability of the State) and Appendix B (Commentary on Federal Liability for Erroneous Payments) attached hereto are included as part of this agreement.

ARTICLE XVI[1]. LIMITATION OF FISCAL LIABILITY OF THE STATE

In recognition of the fact that the State will not exceed the non-Federal share of expenditures as aid or assistance for quarters in calendar 1972 under the plans of the State approved under Titles, I, X, XIV, and XVI of the Act, and that the State cannot avail itself of the limit of fiscal liability afforded by section 401 of the Act, the State waives the application of this provision. The State shall pay the Secretary on a monthly basis for those expenditures made by the Secretary for State supplementary payments and mandatory minimum supplements in accordance with section A of Article VI, on or before the date payment is to be received in the month by recipients or 5 days after delivery to the State of the SDX payment date file issued in connection with the monthly treasury tape, whichever is later.

In Witness Whereof, the parties hereby execute this agreement this __ day of __________, 1976.

The Secretary of Health
Education, and Welfare.

By ______________________________

____

____
(Title)

____
(State)

By ______________________________

____
(Title)

____

____
(Address)

I, __________, certify that I am the Attorney General[2] of the State of __________; that __________, who signed this agreement on behalf of the State, was then __________ of said State, and that he is authorized to enter into agreements of this nature on behalf of the State and that there is authority under the laws of the State of __________ to carry out all the functions to be performed by the State as provided herin and comply with the terms of this agreement.

____
Signature of Attorney General

APPENDIX A

DETERMINATIONS OF SUPPLEMENTARY PAYMENT AMOUNTS AND LIMITATION OF FISCAL LIABILITY OF THE STATE

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[1] Insert this article where the State desires to waive "hold-harmless".

[2] or legal counsel for the State Agency.

ARTICLE I

In determining the amount of any supplementary payments payable to eligible individuals or eligible spouses of such individuals, the Secretary shall apply all of the income exclusions provided in subsection 1612(b) of the Act, and shall make such payments in accordance with the payment levels in the Schedule of Payments attached. The payment levels shown include the basis Federal payment.

ARTICLE II. LIMITATION OF FISCAL LIABILITY OF THE STATE

A. The amounts payable to the Secretary by the State for making supplementary payments and mandatory minimum supplement payments on behalf of the State shall be limited to the amount determined in accordance with the application of section 401 of P.L. 92–603. (The State shall pay such amounts determined payable as provided in Article VI-A of this agreement).

B. For purposes of administering this agreement, the non-Federal share of expenditures for aid or assistance for calendar year 1972 (referred to in such section 401) shall be determined in accordance with the Act and regulations promulgated by the Secretary, and pursuant thereto is provisionally[3] established as __________.

C. For purposes of administering this agreement, the State's adjusted payment levels shall be determined in accordance with regulations promulgated by the Secretary, and with reference thereto are provisionally[1] established as—

1. With respect to an aged eligible individual, ______;
2. With respect to a blind eligible individual, ______;
3. With respect to a disabled eligible individual, ______;
4. With respect to an aged eligible individual and such individual's aged eligible spouse, ______;
5. With respect to a blind eligible individual and such individual's blind eligible spouse, ______;
6. With respect to a disable eligible individual and such individual's disabled eligible spouse, ______;
7. With respect to an aged eligible individual and such individual's blind eligible spouse, ______;
8. With respect to an aged eligible individual and such individual's eligible disabled spouse, ______;
9. With respect to a blind eligible individual and such individual's disabled eligible spouse, ______;

SCHEDULE OF PAYMENTS (PAYMENT LEVELS) FOR THE PERIOD OCTOBER 1, 1976, TO SEPTEMBER 30, 1977

Geographic Area (List Counties)

____________________ ____________________

____________________ ____________________

Category of[1] Eligible Individual(s)	Living Arrangements				
	Column A	Column B	Column C	Column D	Column E
Aged					
Blind					
Disabled					

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[3] If this figure has been finally determined, delete the word "provisionally".

Category of[1] Eligible Individual(s)	Living Arrangements				
	Column A	Column B	Column C	Column D	Column E
Aged and Aged Spouse					
Blind and Blind Spouse					
Disabled and Disabled Spouse					
Aged and Blind Spouse					
Aged and Disabled Spouse					
Blind and Disabled Spouse					

[1] The terms used in this column shall have the following meanings:

1. "Aged"—an aged eligible individual;
2. "Blind"—a blind eligible individual;
3. "Disabled"—a disabled eligible individual;
4. "Aged and Aged Spoused"—an aged eligible individual and such individual's aged eligible spouse;
5. "Blind and Blind Spouse"—a blind eligible individual and such individual's blind eligible spouse;
6. "Disabled and Disabled Spouse"—a disabled eligible individual and such individual's disabled eligible spouse;
7. "Aged and Blind Spouse"—an aged eligible individual and such individual's blind eligible spouse;
8. "Aged and Disabled Spouse"—an aged eligible individual and such individual's disabled eligible spouse;
9. "Blind and Disabled Spouse"—a blind eligible individual and such individual's disabled eligible spouse.

Definition Of Categories

Column A:
Column B:
Column C:
Column D:
Column E:

Exclusions

(Other than required by law or regulations.)

APPENDIX B

COMMENTARY ON FEDERAL LIABILITY FOR ERRONEOUS PAYMENTS

The language of Article IX has been modified to reflect that the provisions of the prior agreement of Federal fiscal liability (FFL) shall be carried forward to the present agreement period. These provisions shall be effective until the effective date of any new regulations promulgated on quality assurance for the AFDC and SSI programs. At the time of promulgation this article will be renegotiated, with no liability accruing for the Secretary under the SSI program until mutual agreement at which time liability will be effective retroactively to the effective date of the new regulations.

The States will be considered to be in compliance for any 6-month period where the Secretary has not made a formal finding of noncompliance. Absent such a finding, the Secretary will be liable for erroneous payments under the SSI program for such periods.

This language is provided by way of clarification of the Secretary's position with respect to the following items:

1. Maryland v. Mathews cannot be used as a defense against the Secretary's liability for erroneous payments under the SSI program;
2. The Secretary would continue to be liable for erroneous payments above a 3 percent case error level for ineligibles and a 5 percent case error level for overpayments.
3. A State will be in compliance with 45 CFR 205.40 and 45 CFR 205.41 for any 6-month period until the Secretary makes a formal determination of non-compliance with any such determination being applicable only to the 6-month period for which the determination is made.
4. The fact that a State has an error rate in the AFDC program above the tolerance level established will not in itself constitute the State being in noncompliance. If a State pays the appropriate penalty for any period of noncompliance, the State will be then found to be in compliance for purposes of FFL under the SSI program.

Section C of Article IV provides that neither the results of State audit nor the results of the State's quality assurance reviews may be substituted for the provisions of Article IX as the basis for determining Federal fiscal liability for erroneous payments. The Secretary will, however, take into account those results as they pertain to the accuracy of determinations of erroneous payments in the SSI quality assurance process specified in Article IX.

REPORT IN SUPPORT OF RECOMMENDATION 79-3

THE ASSESSMENT AND MITIGATION OF CIVIL MONEY PENALTIES BY FEDERAL ADMINISTRATIVE AGENCIES*

Colin S. Diver

I. INTRODUCTION

The administrative civil money penalty has unquestionably come of age. Although Congress has authorized civil fines for federal regulatory offenses for well over a century,[1] until quite recently it restricted their use to a handful of federal programs and their ascertainment and collection to judicial proceedings. As late as 1965, Louis Jaffe could say that an administrative fining power is "rarely conferred" and that "it is a close question whether there is sufficient advantage in conferring" such a power.[2] In the fourteen years since that was written, the civil fine has assumed a place of paramount importance in the compliance arsenal of most federal regulatory agencies. It is today almost inconceivable that Congress would authorize a major adminstrative regulatory program without empowering the enforcing agency to impose civil monetary penalties as a sanction. It has been become commonplace for observers of the administrative process, disillusioned with traditional criminal, injunctive and license-removal sanctions, to urge greater reliance on civil fines as an enforcement device.[3]

The use of administrative civil money penalties was once beset by a host of doubts about the constitutional authority of Congress to establish

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* Abridged version published at 79 *Colum. L. Rev.* 1435 (1979).

[1] The earliest commonly cited case approving their use is Bartlett v. Kane, 16 How. 263 (U.S. 1853).

[2] L. Jaffe, Judicial Control of Adminstrative Actions 114 (1965).

[3] *See, e.g.*, Ayres, *Enforcement of Air Pollution Controls on Stationary Sources Under the Clean Air Amendments of 1970,* 4 Ecology L.Q. 441, 473-74 (1975); Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies,* 66 Colum. L. Rev. 1254 (1966); Kovel, *A Case for Civil Penalties: Air Pollution Control,* 46 J. Urban L. 153 (1969); Marshall, *Environmental Protection and the Role of the Civil Money Penalty: Some Practical and Legal Considerations,* 4 Environmental Affairs 323 (1975). See also Comptroller General of the United States, United States Attorneys Do Not Prosecute Many Suspected Violators of Federal Laws 11-12 (1978), and Higher Penalties Could Deter Violations of Nuclear Reg. 4 (1979).

"civil" offenses, punishable in a civil action or by an administrative proceeding subject only to limited judicial review. But those doubts have long since vanished,[4] and in their wake a new generation of issues has arisen concerning the allocation of decisional authority between courts and agencies. While some of those issues have been confronted,[5] many remain to be resolved. Yet, even as many questions of statutory interpretation await resolution, a third category of issues has begun to demand systematic attention—policy questions about the ways in which administrative agencies should exercise their discretionary authority to impose civil money penalties. This report attempts such a systematic review of the principal outstanding statutory and administrative issues presented by the use of civil money penalties as a regulatory sanction.

II. SCOPE OF THE STUDY

In 1972 the Administrative Conference of the United States surveyed the use of civil money penalties by federal administrative agencies.[6] Although the study found that such penalties were in widespread and growing use, it observed that there remained many situations in which agencies had to rely on cumbersome license removal or criminal sanctions as a means of enforcing compliance with the laws they administered.[7] Concluding that civil monetary penalties "provide an ideally flexible sanctioning tool," the Administrative Conference recommended that authority to invoke such sanctions "generally should be sought."[8] The recommendation asserted that the benefits of civil penalties could best be achieved, particularly when certain factors were present, by an "administrative imposition system."[9] That is, the agency should itself be empowered to adjudicate the violation and assess the penalty, after a trial-type hearing, subject only to "substantial evidence" judicial review. This system, the Conference concluded, would avoid the delays, high costs, and jurisdictional fictions inherent in the traditional and most common system of assessing civil money penalties by a court in a civil action initiated by the Department of Justice.

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[4] *See, e.g.,* Hepner v. United States, 213 U.S. 103 (1908); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Lloyd Sabaudo S.A. v. Elting, 287 U.S. 329 (1932); Helvering v. Mitchell, 303 U.S. 391 (1938); Atlas Roofing Company v. OSHRC, 430 U.S. 442 (1977).

The courts of a few states continue to disapprove legislative delegations of power to impose flexible civil fines. *E.g.,* County Council v. Investors Funding Corp., 312 A.2d 225 (Md. 1973); State *ex rel.* Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968).

[5] *See, e.g.,* Bickart, *Civil Penalties Under Section 5(m) of the Federal Trade Commission Act,* 44 U. Chi. L. Rev. 761 (1977); Gaynor, *The Toxic Substances Control Act: A Regulatory Morass,* 30 Vand. L. Rev. 1149, 1187–89 (1977); Lawrence, *Judicial Review of Variable Civil Money Penalties,* 46 U. Cin. L. Rev. 373 (1977); Schmeltzer & Kitzes, *Administrative Civil Penalties Are Here to Stay—But How Should They Be Implemented?* 26 Am. U.L. Rev. 847 (1977).

[6] Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties As a Sanction by Federal Administrative Agencies,* 2 Recommendations and Reports of the Administrative Conference of the United States 896 (1972).

[7] *Id.* at 898.

[8] 1 C.F.R. § 305. 72–6(A) (1978).

Since those recommendations were made, the number of civil money penalties in general and "administratively imposed" penalties in particular has increased significantly.[10] Yet, the number of penalties whose method of imposition fully fits the recommended system remains decidedly in the minority.[11] Many statutes continue to make no express reference to any agency role in the penalty imposition process. Others contemplate only an apparently limited role, with the courts remaining as the principal fact-finder. Yet, casual observation, supplemented by the more systematic empirical observation of several studies, including at least three commissioned by the Administrative Conference,[12] confirms that agencies usually do in fact play very important roles in the administration of such statutes. At a minimum, of course, agencies typically initiate all or nearly all of the civil money penalty actions brought under the statutes they administer. Furthermore, they typically resolve the vast majority of these actions without ever reaching the stage of formal adjudicatory hearing. This is true, as evidence summarized below suggests, whether the "hearing" is offered at the agency or the judicial level.[13] The initiation and termination of civil penalty actions thus constitutes one of those vast areas of largely undocumented, unstudied, and misunderstood agency behavior customarily described as "informal action."[14]

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[9] 1 C.F.R. § 305. 72–6(B) (1978).

[10] For a partial list of civil money penalty statutes enacted since 1972, see Atlas Roofing Company v. OSHRC, 518 F.2d 990, 1008–09 (5th Cir. 1975), *aff'd.*, 430 U.S. 442 (1977).

[11] *See* pp. 213–214 *infra.*

[12] Davenport, *Report on Adminstrative Procedure of the Internal Revenue Service* 619–729, Sen. Doc. 94–266, 94th Cong., 2d Sess. (1975); Gerhart, *Judicial Review of Customs Service Actions* 71–81 (August 17, 1977); Gifford, *Remission and Mitigation of Forfeitures in the Department of Justice,* 1 Recommendations and Reports of the Administrative Conference of the United States 697 (1968). The recommendations adopted by the Administrative Conference on the basis of the Davenport report (ACUS Recommendation 75–7, 41 Fed. Reg. 3984 (1976)) were discussed in Asimow, *Civil Penalties for Inaccurate and Delinquent Tax Returns,* 23 U.C.L.A. L. Rev. 637 (1976). For other studies of the penalty-imposition process, see Comptroller General of the United States, Customs' Penalty Assessment and Mitigation Procedures—Changes Would Help Both the Government and Importers (1978); Dickey, *Customs: Fines, Forfeitures, Penalties and Mitigation Procedures—Sections 592 and 618 of the Tariff Act of 1930,* 30 Bus. L. 299 (1975); Dickey; *Survivals from More Primitive Times: Customs Forfeitures in the Modern Commercial Setting Under Sections 592 and 618 of the Tariff Act of 1930,* 7 L. & Policy in Int'l. Bus. 691 (1975); Murphy, *Money Penalties—An Administrative Sword of Damocles,* 2 Santa Clara Lawyer 113 (1962).

[13] *See, e.g.,* pp 239, 251, 260, 283 *infra.*

Research for this study was undertaken in two stages. The first was a general survey of federal agencies' use of money penalties in their enforcement activities. A detailed questionnaire[15] was prepared asking agencies to specify, for each civil money penalty statute enforced by them, certain characteristics of the statute and the procedures used by the agency to implement it. The Administrative Conference distributed the questionnaire, in January, 1978, to every federal agency thought to have some civil penalty authority (12 departments and 18 independent agencies). Complete replies were received from 28 agencies and partial replies were received from two. Since many agencies distributed the questionnaire to their administrative subdivisions, considerably more than 30 units replied. The statistical results of this survey are reported in the body of this report and the exhibits annexed to it.[16]

The second phase of the project consisted of identifying a small number of case studies for more intensive examination. Based upon the questionnaire responses, I identified four agencies whose statutory mandates, programmatic responsibilities, and penalty enforcement procedures seemed to reflect most of the variables observed in the universe of responses. The four case studies selected were: the mine safety program (enforced by the Mine Safety and Health Administration of the Department of Labor and the Mine Safety and Health Review Commission); the United States Coast Guard (especially penalties for discharge of oil and hazardous substances into waterways); the Federal Communications Commission (penalties enforced by the Broadcast Bureau and the Safety and Special Radio Services Bureau); and the Interstate Commerce Commission (all penalties authorized by the Interstate Commerce Act). In the course of conducting the case studies, I personally interviewed agency officials involved in the oversight or operation of each program,[17] obtained summary data on a large sample of civil money penalty cases, and in most cases reviewed the files of a small number of representative cases. The results of these investigations are summarized in a later section of this report and form a substantial part of the basis for its conclusions and recommendations.

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[14] For discussions of the need, and methods by which, to study informal administrative action, see Davis, *Informal Administrative Action: Another View,* 26 Am. U.L. Rev. 836 (1977); Gardner, *The Informal Actions of the Federal Government,* 26 Am. U.L. Rev. 799 (1977); Gardner, *The Procedures by Which Informal Action Is Taken,* 24 Ad. L. Rev. 155 (1972); Lockhart, *The Origin and Use of "Guidelines for the Study of Informal Action in Federal Agencies,"* 24 Ad. L. Rev. 167 (1972).

[15] *See* Appendix A, pp. 373–75, *infra.*

[16] *See* Exhibits 1A–8B, pp. 356–71, *infra.*

[17] The following agency officials were interviewed: 1) MSHA: Madison McCulloch, Director, Office of Assessments (Arlington, Virginia, July 19, 1978); 2) USCG: Lt. Cmdr. S.J. Delaney, Office of Chief Counsel, International and Maritime Law Division (Washington,

III. STATUTORY TYPES

There are some 348 statutory civil penalties[18] enforced by 27 federal departments and independent agencies. These penalties are authorized for the enforcement of a host of regulatory commands relating to such varied subjects as the operation authority of carriers[19] and broadcasters,[20] safety standards for consumer products,[21] workplaces,[22] vessels[23] and vehicles,[24] marketing restrictions,[25] prohibitions against fraud and deception,[26] liquidity requirements for banks,[27] revenue laws,[28] and pollution abatement requirements.[29] Civil money penalties may be invoked for violating statutes, administrative regulations or administrative orders, for failure to file

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D.C., May 18, 1978); 3) FCC: Stephen Sewell, Broadcast Bureau (Washington, D.C., July 20, 1978); James McKinney, Deputy Chief, Field Operations Bureau (Washington, D.C., June 7, 1978); Maurice DePont, Safety and Special Radio Services Bureau (Washington, D.C., May 17 and July 20, 1978); Upton Guthrey, Office of General Counsel (Washington, D.C., May 17, 1978); 4) ICC: Daniel O'Donaghue, Bureau of Investigations and Enforcement (Washington, D.C., June 8, 1978); James Taylor, BIE (Washington, D.C., June 8, 1978)); Stanley Braverman, BIE (Washington, D.C., June 9, 1978); Robert Abare, Regional Managing Director (Boston, Mass., August 2, 1978); John Curley, Regional Counsel (Boston, Mass., June 14 and August 2, 1978). I express my personal gratitude to all of them for their generous assistance, as well as to many other unnamed agency officials and employees who assisted me in gathering documentary and statistical data.

[18] For purposes of the statistical findings reported herein the unit of analysis is variously designated the "civil penalty," "statute," or "statutory provision." Each separately numbered or alphabetized subsection of a statute which specifies that a civil money penalty is authorized for the violation of a specified offense is counted as a single "penalty" (or "statute"). Thus, a single numbered statutory section may contain several "penalties" (or "statutes").

[19] *E.g.*, 47 U.S.C. § 203 (1976) (communications); 49 U.S.C. § 1(12) (1970) (rail); 49 U.S.C. § 322(h) (1970) (motor); 49 U.S.C. § 1474 (1970) (air).

[20] *E.g.*, 47 U.S.C. § 503(b) (Supp. 1978).

[21] *E.g.*, 15 U.S.C. § 2069 (1976).

[22] *E.g.*, 29 U.S.C. § 666 (1976) (occupational health and safety); 30 U.S.C. § 819 (Supp. 1977) (mine health and safety).

[23] *E.g.*, 33 U.S.C. § 1208 (1976) (vessel navigation); 46 U.S.C. § 1484 (1975) (boating safety).

[24] *E.g.*, 15 U.S.C. § 1917 (1976) (passenger motor vehicles).

[25] *E.g.*, 7 U.S.C. § 1314 (1976) (tobacco); 7 U.S.C. § 1359(a) (1976) (peanuts).

[26] *E.g.*, 7 U.S.C. § 9 (1976) (commodity future trading).

[27] *E.g.*, 12 U.S.C. § 1425a (1976) (FHLBB member banks).

[28] *E.g.*, 26 U.S.C. § 6677 (1976) (failure to file).

[29] *E.g.*, U.S.C. § 1005 (1976) (oil pollution); 42 U.S.C. § 7420 (Supp. 1977) (air pollution).

reports, keep records, permit entry or respond to agency inquiries, for willful, negligent, repeated or even unintended conduct.

Statutes use a great variety of terms to define the precise role to be played by administrative agencies in imposing civil money penalties, and the relationships between that role and the role of the courts. Most early civil money penalty statutes provide for enforcement in a civil action brought in the federal district courts. The agency's role was limited to that of prosecutor—or more accurately, to referring cases for prosecution by the Department of Justice. These statutes, however, sometimes conferred an explicit authority on the agency to "mitigate" penalties prior to referral for prosecution. A few older statutes, and a number of more recent ones, contemplate a larger agency role. The agency may be directed to "assess" the penalty, perhaps after affording the alleged violator notice and an opportunity to reply, prior to referring the case for prosecution. Some statutes authorize the agency to adjudicate the penalty claim itself, subject only to limited judicial review of its action. Similarly, a variety of statutory provisions define the scope of "sentencing" discretion conferred upon the court or agency. Historically, many regulatory statutes specified a fixed monetary penalty, reflection early doubts about the constitutional authority of the legislature to delegate a flexible fining power to an administrative agency.[30] Today, fixed-penalty statutes are increasingly giving way to variable-penalty statutes authorizing the penalty to be set at any level up to a statutory limit, sometimes supplemented by a statutory enumeration of the factors to be considered in the process.

All civil penalties authorized by Congress are, expressly or by implication, subject to ultimate collection in a United States District Court.[31] In the absence of clear Congressional direction to the contrary,[32] the application of the coercive power of government to compel payment requires the approval of a court. Many statutes dealing with maritime law specify that the appropriate procedure is an action in libel brought by the United States against the offending vessel.[33] All other civil penalties are, by express provision[34] or by implication,[35] enforceable in a civil action, including of course, an opportunity for jury trial of contested factual issues not foreclosed by a previous binding judgment.[36] Except in those relatively rare instances in which the agency is authorized by statute to appear in court through its own counsel,[37] enforcement action must be initiated by the Department of Justice. In practice, the Justice Department has delegated its authority to prosecute most civil money penalty cases to the several United States Attorneys.[38] Once the case has been referred to Justice, it possesses exclusive control over its prosecution, trial, appeal, and settlement,[39] unless the statute expressly provides otherwise.[40] The agency's role at the enforcement stage, then, is limited to referring cases to the Justice Department and providing advice to the prosecuting attorney.

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[30] Such doubts may have been fed by the Supreme Court's denunciation of an administrative imprisonment and deportation power in Wong Wing v. United States, 163 U.S. 228 (1895), and the fact that early money penalty cases involved fixed-penalty statutes. *E.g.*, Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909). *See* Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies,* 42 Mich. L. Rev. 51, 82, (1943). *Wong Wing,* of course, is easily distinguished in terms of the nature, rather than the flexibility, of the penalty. Whatever their source, such doubts led several lower federal courts and state courts to oppose delegation of flexible fining power to administrative agencies. *See, e.g.,* Jasper v. Hellmich, 4 F.2d 852 (D. Mo. 1925); Tite v. State Tax Commission, 89 Utah 404, 57 P.2d 734 (1936). The Supreme Court has, apparently, never squarely faced that specific issue. But its decision in Helvering v. Mitchell, 303 U.S. 391, 400 (1938), indicated approval of the practice. Its recent decisions under the Occupational Safety and Health Act (Atlas Roofing Company v. OSHRC, 420 U.S. 442 (1977)) and the Mine Safety and Health Act (National Independent Coal Operators Association v. Kleppe, 423 U.S. 388 (1976)) demonstrate that the issue has no remaining vitality at the federal level.

[31] *See* 28 U.S.C. § § 1355, 2461(a). *See also* Lees v. United States, 150 U.S. 476, 478 (1893): "From the earliest history of the government the jurisdiction over actions to recover penalties and forfeitures has been placed in the district court."

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[32] *See, e.g.*, 8 U.S.C. § 1221(d) (1976), authorizing the Attorney General to refuse clearance to an aircraft or vessel whose owner or master has refused to pay a penalty administratively assessed for failing to deliver a full and manifest of passengers. A similar enforcement device is authorized by 8 U.S.C. §§ 1284(a), 1323(b), and 1323(d) (1976).

[33] *E.g.*, 8 U.S.C. § 1321(a) (1976) (landing of aliens); 18 U.S.C. § 1083 (1976) (transporting persons to gambling ship); 47 U.S.C. 386(a) (1976) (radio installation on vessels). *See generally* 28 U.S.C. § 2461(b) (1976).

[34] *E.g.*, 7 U.S.C. § 203 (1976) (registration of stockyard dealer); 12 U.S.C. § 1908 (1976) (Federal Reserve Credit control); 13 U.S.C. § 305 (1970) (import-export information); 15 U.S.C. § 45(m) (Supp. 1977) (unfair and deceptive trade practices); 33 U.S.C. § 1517 (1976) (oil pollution).

[35] *See* 28 U.S.C. § 2461(a) (1976).

[36] An adjudication of facts by an agency on the record of an evidentiary hearing may, of course, be binding on the accused. United States v. Sykes, 310 F.2d 417 (5th Cir. 1962); Weir v. United States, 310 F.2d 149 (8th Cir. 1962). A number of statutes specifically provide that an unappealed administrative order imposing a penalty is binding on the accused in a subsequent collection action. *E.g.*, 15 U.S.C. § 2008(b) (1976) (automotive efficiency); 15 U.S.C. § 2615 (Supp. 1977) (toxic substances control); 47 U.S.C. § 503(b) (3) (A) (Supp. 1978) (FCC rules and license conditions).

[37] *E.g.*, 12 U.S.C. § 1464(d) (I) (1976) (Federal Home Loan Bank Board); 15 U.S.C. § 46(a) (1) (Supp. 1977) (Federal Trade Commission, if Attorney General fails to commence action within 45 days of request to do so); 15 U.S.C. § 1917(a) (1976) (Secretary of Transportation, with concurrence of Attorney General); 15 U.S.C. § 2076(b) (7) (1976) (Consumer Products Safety Commission, with concurrence of Attorney General); 29 U.S.C. § 216(e) (1976) (Secretary of Labor); 33 U.S.C. § 944(g) (1976) (Secretary of Labor).

[38] 28 C.F.R. § 0.168 (1977); 28 C.F.R. Appendix to Subpart Y (1977); United States Department of Justice, United States Attorneys' Manual §§ 4–1.311, 4–1.313 (January 3, 1977). A few statutes explicitly confer prosecutorial authority on the United States Attorneys. *E.g.*, 16 U.S.C. § 825n(a) (1976); 45 U.S.C. §§ 6. 17, 34, 64a (1976); 49 U.S.C. §§ 20(7) (a) and (d) (1976).

[39] *See* FTC v. Guigon, 390 F.2d 323 (8th Cir. 1968); Executive Order 6166 § 5, June 10, 1933; United States Department of Justice, United States Attorneys' Manual §§ 4–1.100, 4–1.410, 4–1.420 (January 3, 1977).

This description of the agency's inherent prosecution-referral function does not, of course, consider the additional responsibility that might be conferred upon the agency by Congress. In fact, in only 43 (12 per cent) of the 348 civil money penalty statutes has Congress made no express mention of the agency's role. In all of the other penalty statutes, Congress has assigned the agency at least some function beyond that of prosecution-referral. There are two principal types of agency functions articulated in the statutes—the "assessment" and "mitigation" functions.

A. *Assessment*

In 141 (41 per cent) of the 348 statutes Congress has expressly conferred upon an administrative agency an authority to "assess" the penalty. For convenience sake, these 141 statutory penalties will be referred to as "agency-assessment" penalties, and the remaining 207 penalties will be referred to as "court-assessment" penalties. The term "assess" is not defined in the statutes and since it does not appear to be a term of art,[41] one cannot assume that it always has the same meaning wherever it appears. At a minimum, the term appears to contemplate a process of making a formal claim upon a person for a specified of specifiable sum of money, premised upon an initial determination that that person has violated a legal command and that the sum demanded is either the statutorily mandated penalty or a statutorily permitted and appropriate penalty for that offense.[42] Since the role of prosecutor or even prosecution-referral is usually assumed to include those same activities, the operational significance of an unembellished "assessment" authority may not be readily apparent. At a minimum, it may simply be a way of limiting the scope of prosecutorial discretion customarily exercised by the Justice Department. That is, under an "agency-assessment" statute, a judicial enforcement action may not be instituted by the Department until the regulatory agency has first "assessed" the penalty. Under a "court-assessment" statute, by contrast, the Justice Department may conceivably initiate a prosecution without the agency's concurrence. As such, the express delegation of assessment responsibility reflects a Congressional judgment that regulatory effectiveness and uniformity require agency participation in the initiation of any enforcement action. A subsidiary objective might be to encourage administrative resolution of the case by interposing a required procedural step ("assessment") before institution of judicial enforcement action.

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[40] *See, e.g.,* 15 U.S.C. § 46(a) (3) (B) (Supp. 1977) (requiring FTC approval for settlement by Attorney General on appeal of any action initially prosecuted by FTC counsel). *See also* 15 U.S.C. § 45(a) (m) (3) (Supp. 1977).

[41] A few statutes use terms other than "assess" that I have interpreted as having the same meaning. *E.g.,* 7 U.S.C. §§ 1314(b) and 1359(a) (1976) ("require collection of"); 29 U.S.C. § 216(e) (1976) ("determine the amount of," "impose"); 39 U.S.C. § 5403 (1976) ("impose").

[42] The Supreme Court seemed implicitly to adopt such a definition in National Independent Coal Operators Ass'n v. Kleppe, 423 U.S. 388, 398 (1976), when it held that "assess," as used in section 109(a) (3) of the Federal Coal Mine Health and Safety Act of 1969, did not require formal findings of fact:

> "the Secretary has a sufficient factual predicate for the assessment of a penalty based on the reports of the trained and experienced inspectors who find violations . . . "

As a practical matter, this constraint on the prosecutorial discretion of the Justice Department hardly seems necessary. The likelihood of the Justice Department's initiating a prosecution without a preliminary recommendation and settlement attempt at the agency level is infinitesimal. The Department has a policy of rejecting prosecution requests until the agency makes an affirmative effort to resolve the case by negotiation. Only if efforts to settle the case at the administrative level fail and the agency formally requests the Department to initiate a judicial enforcement action will the Department prosecute.[43]

An express assessment provision may, however, impose a useful constraint on the *agency's* prosecutorial discretion which would not otherwise be present—that is, to create a judicially enforceable obligation on the agency to institute an enforcement action when certain conditions are present. By specifying that the agency "shall" assess a penalty for a suspected violation, an assessment provision may counteract the usual presumption that prosecutors have no judicially enforceable duty to prosecute.[44]

An unadorned assessment power may also be read as an implicit statement about the allocation of decisional authority between the agency and the courts. A delegation of assessment authority to the agency could be viewed as a Congressional instruction to the courts to accord the agency's action at least some weight in a subsequent enforcement action.[45] The price of such deference, of course, may be an implicit requirement that the agency exercise a more balanced, considered judgment than might be characteristic of a prosecutor. Thus, it might be interpreted as a signal to the agency to articulate substantive assessment criteria at a level of detail greater than may be found in the statute or may be likely to emerge from a sporadic process of judicial decision.[46] The operational implication of such pronouncements is, of course, not instantly apparent. It remains largely to the agency, in its judgment, to find ways to give practical content to the values implicit in a delegation of law-making responsibility. The function of this report is to explore some of the ways in which that can be done.

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[43] *See* 4 C.F.R. § 105.1 (1978). *Cf.* United States Department of Justice, United States Attorneys' Manual § 4-6.500 (January 3, 1977):

> "Civil penalties are assessed to vindicate *agency* enforcement policy, or to compel compliance with *agency* orders, etc. . . . . Thus, the views of the client agency should always be sought before considering the compromise or closing of such cases. . . . " (Emphasis original).

[44] *See* p. 333 *infra.*

[45] *See* pp. 327–28 *infra.*

The procedural significance of a delegation of assessment power to the agency is not always left to speculation. Congress has often, by explicit statutory language or in legislative history, given clearer direction. Fifty-four (38 per cent) of the agency-assessment statutes require the agency to provide an opportunity for some form of "hearing." Twenty-seven of these statutes specify that the hearing must be a formal trial-type hearing on the record.[47] The remaining 27 "hearing" statutes merely require the agency to afford the alleged violator "notice and an opportunity for a hearing," however, without further specification of the procedures required.[48] These statutes have generated conflicting interpretations of the type of hearing which must be provided by the agency and the resulting standard of judicial review.[49] Another source of ambiguity is the precise scope of the mandated "hearing"—that is, whether the agency must provide a hearing on, and make formal findings of fact with regard to, the determination of the penalty amount as well as the determination of liability. Only 13 statutes seem to provide a clear answer: seven require the "hearing" to be held only with regard to the fact of violation,[50] while six quite clearly require the hearing to encompass both issues.[51] The presence of statutorily enumerated criteria for setting the penalty amount strongly indicates that the hearing should encompass that issue as well.[52] In fact, all agencies required to hold a "hearing" claim to receive evidence and on both issues.

A second method by which Congress may clarify the procedural and jurisdictional implications of an "assessment" power is by its provision for judicial review or enforcement of an assessment order. For example, a statutory specification that an administrative assessment was subject only to "substantial evidence" judicial review would imply that Congress intended that the agency conduct an evidentiary hearing. Conversely, an express provision that the penalty is subject to determination only after a plenary judicial trial might be taken to suggest that no administrative hearing is necessary.

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[46] *See* note 397 *infra.*

[47] 7 U.S.C. § 9 (1976); 7 U.S.C. § 193(b) (1976); 7 U.S.C. § 213(a) (1976); 7 U.S.C. § 2048(b) (1976); 15 U.S.C. § 2615 (1976); 16 U.S.C. § 1540a (1976); 16 U.S.C. § 1858 (1976); 29 U.S.C. § 216(e) (1976); 29 U.S.C. §§ 666(a)–(d), (h) (1976); 30 U.S.C. § 819 (Supp. 1977); 30 U.S.C. § 1268 (Supp. 1977); 42 U.S.C. § 7420 (Supp. 1977); 47 U.S.C. § 503(b) (3) (A) (Supp. 1978); Pub. L. 95–630, §§ 101, 102, 103, 106(a), 106(c), 107(e) (1), 107(e) (2), 107(e) (3), 107(e) (4), 108, 92 Stat. 3641 et. seq. (1978).

[48] *E.g.,* 7 U.S.C. § 13a (Supp. 1978); 15 U.S.C. § 1825 (1976); 16 U.S.C. § 668(b) (1976); 33 U.S.C. § 1005 (1976); 46 U.S.C. § 170 (1976).

[49] *See* notes 229, 230 *infra.*

[50] 7 U.S.C. § 9 (1976); 7 U.S.C. § 499c (a) (1976); 15 U.S.C. § 1990(b) (1976); 15 U.S.C. § 2008(b) (1976); 29 U.S.C. § 216(e) (1976); 33 U.S.C. § 1415(a) (1976); 49 U.S.C. § 1809 (1976).

[51] 15 U.S.C. § 1825 (1976); 16 U.S.C. § 1858 (1976); 30 U.S.C. § 1268 (Supp. 1977); 42 U.S.C. § 300g–3(b) (1976); 42 U.S.C. § 7420 (Supp. 1977); 47 U.S.C. § 503(b) (3) (A) (Supp. 1978).

[52] *See* p. 319 *infra.*

As discussed later, drawing inferences about administrative procedural obligations from provisions for judicial review can be hazardous.[53] Even to the extent that such guidance may be valuable, Congress has provided it relatively infrequently. In 29 statutes Congress has specified judicial review in the courts of appeals: 26 of these specify substantial evidence review and 3 are silent on the scope of review. All 29 are "hearing" statutes (20 specifying a full evidentiary hearing). Forty-seven penalty statutes (all enforced by the IRS) provide for enforcement in the Tax Court. Thirty-two agency-assessment statutes expressly provide for enforcement of an assessment order in federal district court: four stipulate substantial evidence review of the agency's findings, 15 stipulate "de novo" review, and 13 specify only that the order may be enforced in a "civil action." The net result, then, is that one cannot often rely on express judicial review provisions to flesh out the procedural connotations of a delegation of "assessment" power. Many (32) of the (87) agency-assessment statutes which are silent on the procedure to be used are also silent on judicial review. And several (13) of the statutes that do specify the mode of judicial review use an expression ("civil action") that is ambiguous in its precise implications for agency procedure.[54]

B. *The Penalty Amount*

Congress has used several devices to limit the discretion of the penalty-assessor (court or agency, as the case may be) in setting the amount of the penalty. All but three[55] of the 348 civil penalty statutes impose at least an upper limit on the amount: 197 statutes (57 percent) specify a fixed penalty amount, while 151 (43 percent) authorize the imposition of a variable amount up to a specified limit.[56] These are hereinafter referred to as "fixed-penalty" and "variable-penalty" statutes, respectively. The upper limit—

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[53] *See* pp. 320-21 *infra*.

[54] *See* pp. 325-27 *infra*.

[55] The three are 12 U.S.C. §§ 1725 and 1730(1)(5) (1976) (authorizing the Federal Savings and Loan Insurance Corporation to impose "such civil penalties as the Corporation may prescribe") and 39 U.S.C. § 5403 (1976) (United States Postal Service, limited unspecified).

[56] Twelve of these 151 statutes specify a minimum penalty figure. In most of these (7), the minimum is set at one-tenth of the maximum. *E.g.*, 45 U.S.C. §§ 6, 13, 34 and 438 (1976) (equipment and safety requirements for railroads enforced by the Federal Railroad Administration: maximum penalty $2,500, minimum $250).

whether the fixed amount or maximum amount for a variable penalty—is usually stated in dollar terms, although there are 68 statutes (20 percent) which use a verbal formula—such as the "value" of illegally imported goods[57] or the "economic benefit" of delayed compliance with air pollution regulations.[58] The unit to which the penalty limit applies is, of course, the individual "violation" or "offense." Eighty-two statutes (24 percent) specify that each day of offense is a separate violation, but most statutes leave the precise unit of violation undefined.

About half of the civil money penalties have upper limits between $100 and $1,000. The median figure is $500. Thirty-five penalties carry dollar limits of $10,000 or more per violation and 12, limits of $25,000 or more.[59] In addition to imposing an upper limit on the amount of penalty per violation, 35 statutes establish an upper limit on the total civil penalty liability which may be imposed for a related series of offenses.[60] In the case of most variable-penalty statutes, Congress has imposed few constraints on the discretion of the penalty-imposing authority to determine the amount of the penalty within the stated limits. The most common constraint is the enumeration of standards to be considered in determining the penalty amount. An example is Section 16 of the Toxic Substances Control Act which requires the Administrator of the Environmental Protection Agency, in determining the amount of a penalty, to consider "the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history prior such violations, the degree of culpability, and such other matters as justice may require."[61] While the precise language varies considerably, most statutory guidelines contain similar factors. Statutory standards are found in 47 statutes, 45 of which are variable-penalty statutes—a somewhat surprisingly low percentage (30) of total variable-penalty statutes. Most statutes containing enumerated criteria (41) are agency-assessment statutes.

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[57] 19 U.S.C. § 1592 (1976).

[58] 42 U.S.C. § 7420 (Supp. 1977).

[59] Statutes carrying the highest limit per offense are: 7 U.S.C. § 9 (1976) (manipulation of commodity future price, etc.: $100,000); 7 U.S.C. § 13a (1976) (violation of rules by contract market: $100,000); 16 U.S.C. § 971e(C) (1976) (illegal importation of protected species of fish: $100,000); 16 U.S.C. § 971e(A) (Supp. 1978) (catching or transporting such fish: $50,000 for second offense); 16 U.S.C. § 1433 (1976) (violation of marine sanctuaries regulation: $50,000); 33 U.S.C. § 1415(a) (1976) (ocean dumping: $50,000); 15 U.S.C. § 2615 (1976) (unauthorized manufacture or distribution of toxic substances: $25,000); 16 U.S.C. § 1376(b) (1976) (taking protected marine mammals: $25,000); 16 U.S.C. § 1858 (1976) (violation of fishery management plan: $25,000); 21 U.S.C. § 842 (1976) (violation of controlled substances regulations: $25,000); 42 U.S.C. § 6928 (1976) (improper disposal of hazardous wastes: $25,000); 42 U.S.C. § 7413(b) (Supp. 1977) (stationary source violation of air pollution abatement plan: $25,000).

[60] *E.g.*, 15 U.S.C. § 1398 (manufacture or sale of substandard motor vehicles: penalty not to exceed $1,000 per violation nor $800,000 for a "related series" of violations).

[61] 15 U.S.C. § 2615(a) (1976).

The operational significance of a statutory enumeration of standards depends on the procedural context. The statutory command to consider the enumerated factors typically addresses the official with assessment authority.[62] Some observers interpreted such a command as requiring the assessing authority to issue formal findings of fact with his initial assessment, showing that the assessment reflected consideration of the enumerated factors. This position, argued in the context of the Coal Mine Health and Safety Act of 1969,[63] was rejected by the Supreme Court In *National Independent Coal Operators v. Kleppe.*[64] The court held that only if the mine operator availed himself of the "opportunity for a hearing" guaranteed by the Act did the Secretary of Labor have to issue formal findings. The 1977 amendments to the Act confirmed this reading.[65] The implication of the decision, then, is that an enumeration of statutory criteria does not enlarge the procedural rights otherwise conferred upon the accused. It does, however, define legal issues which must be considered by the adjudicator and on which formal findings must be made in the decision on a formal hearing.

C. *Mitigation*

A second method by which Congress defines the scope of authority delegated to agencies is the "mitigation clause." I use the term "mitigation clause" to refer generally to any provision effectively empowering an agency to reduce, cancel, compromise, or remit a claim for a civil monetary penalty. Mitigation clauses are surprisingly common. Many may be found in the same statutory provision authorizing the penalty itself, while some agencies have general mitigation authority applicable to many or all of the civil money penalties which they enforce.[66] By such means, Congress has explicitly authorized agencies to mitigate or compromise 266 (79 per cent) of the civil money penalties currently in force. Congress has used a variety of terms in what I have called "mitigation" clauses, including "mitigate,"[67]

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[62] A few statutes articulate standards specifically applicable to a mitigation decision. *E.g.*, 46 U.S.C. § 23 (1976) (Commissioner of Customs may mitigate penalty for misusing a certificate of registry of vessel, if penalty "was incurred without willful negligence or intention of fraud"); 15 U.S.C. § 2008(b) (1976) (Secretary of Transportation may mitigate fixed penalty for violation of vehicle economy standards rules for three enumerated reasons).

[63] 83 Stat. 742, § 109(a)(3), *as amended,* 30 U.S.C. § 820 (A) (Supp. 1977).

[64] 423 U.S. 388 (1976).

[65] 30 U.S.C. § 820(i) (Supp. 1977).

[66] *E.g.*, 19 U.S.C. §§ 1618, 1623(c) (1976) (Secretary of Treasury, penalties imposed under customs laws); 26 U.S.C. § 7122 (1976) (Secretary of Treasury, penalties under revenue laws); 46 U.S.C. § 7 (1976) (Commandant of Coast Guard, penalties under laws relating to vessels); 47 U.S.C. § 504(b) (Supp. 1978) (FCC, most penalties under communications laws); Pub. L. 92–416 § 3, 86 Stat. 653 (1972) (Federal Maritime Commission).

[67] *E.g.*, 8 U.S.C. § 1229 (1976); 12 U.S.C. § 1425b (1976); 16 U.S.C. § 772 (1976); 33 U.S.C. § 364 (1976).

"modify,"[68] "compromise,"[69] "remit,"[70] and "refund."[71] since no widespread interpretive gloss has been imposed on these words by courts, one is left to common usage as an aid to their interpretation. The term "mitigate" has traditionally been used to refer to the process of reducing the severity of a penalty.[72] Mitigation, Roscoe Pound has said, is one of the hallmarks of a mature legal system—one of the processes by which general rules can be adjusted to the idiosyncratic characteristics of individual situations in order to serve a higher conception of justice.[73] A fixed penalty, even if well tailored to the achievement of regulatory objectives in most cases, can produce unexpectedly or excessively harsh results in individual cases. The power to mitigate enables the decisionmaker to take into account the unique circumstances of the violation—its actual and potential consequences—and of the violator—his degree of culpability and ability to sustain any particular punishment—in determining the severity of the penalty.

The term "compromise" suggests a mutually acceptable resolution of differences between two or more parties, with one or more of them making concessions from an initial position. As applied to the imposition of penalties, it suggests a process by which the state, as prosecutor, agrees to terminate an enforcement action in return for an agreement by the alleged violator to incur a specified penalty, presumably somewhat less severe than that initially demanded.[74] The concepts of "mitigation" and "compromise" obviously overlap substantially. Both processes result in a reduction of the severity of a penalty. Unlike compromise, however, mitigation need not be consensual. It may be a unilateral exercise of mercy by the state acting in a coercive capacity, reducing a potentially higher penalty to a level consistent with the demands of justice, but not necessarily acceptable to the violator.[75]

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[68] 15 U.S.C. § 1825 (1976); 15 U.S.C. § 2008(b) (1976); 15 U.S.C. § 2615 (1976).

[69] 7 U.S.C. § 2149 (1976); 15 U.S.C. § 1398 (1976); 15 U.S.C. § 1424 (1976); 45 U.S.C. § 435 (1976).

[70] *See, e.g.,* statutes cited note 67 *supra.*

[71] *E.g.,* 46 U.S.C. § 8 (1976).

[72] *See* Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case,* 35 N.Y.U.L. Rev. 925, 934 (1960): "To mitigate is to make less severe or painful, to lessen or moderate; a term applied particularly to punishment."

[73] *Id.* at 926–27.

[74] The government may, of course, exact some concession other than payment of a money penalty—such as a promise not to repeat the offense or the surrender of offending equipment—in return for dropping the prosecution. Congress has, on occasion, suggested that consideration is not necessary for a "compromise." *E.g.,* 12 U.S.C. § 1425b (1976) (the FHLBB may "with or without consideration, compromise, remit, or mitigate" a penalty). In that context, "compromise" seems to have no independent meaning.

[75] One could conceivably distinguish "mitigation" from "compromise" on the basis that the latter process involves consideration of factors related to the cost and probabilities of collecting a claim not appropriate to the former. I do not believe, however, that such a distinction serves any useful function and have therefore treated "compromise" as part of the generic "mitigation" process. *See* pp. 344–45 *infra.*

"Remit" and "refund" presumably mean to return a sum of money to a violator, once it has been paid or in some fashion withheld by the agency. "Remission" could occur, presumably, as a result of a "mitigation" or "compromise." As a practical matter remission is rarely an issue in administration of civil money penalty statutes since few agencies have the practical capacity to compel forcibly the payment of money prior to the final consensual or adjudicative resolution of the case.[76]

Congress rarely imposes any explicit standards on the exercise of a delegated authority to mitigate civil penalties. Only about ten percent of the mitigation clauses contain any standards whatever, and even those tend to be quite open-ended or limited.[77] Detailed criteria are rare.[78] This lack of standards confirms the traditional view of mitigation as a discretionary act of mercy. In fact many statutes expressly authorize the administrator to mitigate "in his discretion."[79]

"Mitigation" clauses are found in conjunction with all manner of statutory types. The function served by, and indeed the necessity for, an express "mitigation" authority depends on the precise context. A "mitigation" power, in the classical sense, is most obviously useful in the enforcement of statutorily fixed penalties. The mitigation authority makes it clear that the decisionmaker need not be bound to impose the fixed penalty amount where it would be unjust to do so. In fact, Congress has delegated an express mitigation power in 178 of the 197 fixed-penalty statutes. A second function apparently served by "mitigation" clauses is to delineate the allocation of settlement authority among the regulatory agency, the Justice Department, and the court in "court-assessment" statutes. A clause expressly authorizing the agency to mitigate a court-assessable penalty removes any doubts that the agency may accept payment in compromise of a prospective prosecution without approval by the Justice Department or a court.

Congress has not restricted mitigation clauses to fixed-penalty or court-assessment statutes, however. In fact, it has quite freely incorporated mitigation clauses in agency-assessment variable-penalty statutes. (There are 69 such statutes, of which 35 contain mitigation clauses). The utility of a mitigation clause in this context is far from obvious. A variable-penalty statute clearly empowers—indeed, implicitly directs—the decisionmaker to consider "mitigating" factors in assessing the penalty. And an explicit delegation of authority to "assess" a penalty would seem to subsume a power to compromise the penalty claim. Certainly in other contexts, courts have freely presumed that agencies have broad authority to settle cases which they are empowered to adjudicate.[80] The inclusion of mitigation clauses in statutes of this type appears to be little more than a mechanical carry-over from the older fixed-penalty statutes. If they serve any purpose, it is perhaps to remind agencies of their power—indeed their duty—to temper justice with mercy in the application of general rules to individual cases.

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[76] For examples of agencies possessing authority to enforce directly a penalty assessment order, see note 512 *infra.*

[77] *E.g.,* 16 U.S.C. § 668(b) (1976) ("for good cause shown"); 46 U.S.C. § 23 (1976) ("without willful negligence or fraud").

[78] *See, e.g.,* 15 U.S.C. § 2008(b) (1976); 15 U.S.C. § 2069 (1976); U.S.C. § 2069 (1976); 46 U.S.C. § 1484 (1976).

[79] *E.g.,* 33 U.S.C. § 1005 (1976); 33 U.S.C. § 1226 (1976); 46 U.S.C. § 817d (1976); 46 U.S.C. § 1122a (1976).

Even in the absence of an express mitigation power, agencies have a general authority to compromise civil money penalty claims under the Federal Claims Collection Act of 1966.[81] The Act authorizes the "head of an agency" to "compromise . . . claims of the United States for money or property arising out of the activities of, or referred to, his agency."[82] Implementing regulations promulgated jointly by the Attorney General and the Comptroller General[83] interpret "claim" to include claims for civil money penalties as well as claims arising from such sources as government contracts, revenue laws, or tortious acts against the government.[84] Several federal agencies charged with enforcing statutes providing for court-assessable or fixed-penalty statutes have utilized the settlement authority conferred by the Federal Claims Collection Act to compromise civil money penalties.[85] The Act's compromise authority is subject to certain limitations, however. Excluded are claims: (1) exceeding $20,000, (2) "as to which there is an indication of fraud . . . or misrepresentation," or (3) "based in whole or in part on conduct in violation of the anti-trust laws."[86] An express mitigation clause may be justified as freeing the agency from these limitations. As a practical matter, however, very few civil money penalty claims would founder on any of these exclusions. The $20,000 limit has been interpreted to apply to each individual claim, not the aggregate penalty sought for a related series of violations.[87] There are only 12 civil penalties carrying a maximum penalty per violation in excess of $20,000.[88] Since most offenses subject to civil money penalties do not require a showing of "fraud or misrepresentation" (presumably directed toward the government), the second exclusion rarely comes into play.

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[80] *See, e.g.,* Mobil Oil Corporation v. FPC, 417 U.S. 283, 312–13 (1974); NLRB v. Martin A. Gleason, Inc., 534 F.2d 482 (2d Cir. 1976); ILGWU v. NLRB, 501 F.2d 823 (D.C. Cir. 1974); Pennsylvania Gas and Water Company v. FPC, 463 F.2d 1242 (D.C. Cir. 1972).

This does not mean, of course, that an agency may ignore a specific congressional limitation on its discretion to assess a varaible penalty, such as a statutory minimum penalty amount. *See, e.g.,* 45 U.S.C. § 438 (1976) Secretary of Transportation may "compromise" a penalty for violation of railroad equipment standards, "but in no event for an amount less than the minimum provided" in the section).

[81] 31 U.S.C. §§ 951–953 (1976). The Act was designed to stimulate agencies to escalate their debt collection activities. According to a 1970 GAO study, it has had that effect. Comptroller General of the United States, Progress and Problems in Implementing in the Federal Claims Collection Act of 1966 (1970).

[82] 31 U.S.C. § 952 (1976).

[83] 4 C.F.R. Parts 101–105 (1978).

[84] 4 C.F.R. § 103.5 (1978).

[85] *See, e.g.,* 7 C.F.R. § 1.52 (1978) (Department of Agriculture); 31 C.F.R. §§ 5.1–5.4 (1978) (Department of the Treasury); 46 C.F.R. §§ 504–05 (1978) (Federal Maritime Commission); 49 C.F.R. § 1021 (1978) (Interstate Commerce Commission).

[86] 31 U.S.C. § 952 (1976).

An express mitigation clause appears to confer a broader range of discretion on the agency to settle cases. The grounds upon which an agency may compromise a claim under the Claims Collection Act are implicitly limited to issues relating to the collectibility of the claim.[89] A "mitigation" authority, by contrast, permits the agency to reduce the penalty for other reasons such as the gravity of the offense or the violator's culpability.

IV. ENFORCEMENT PROCEDURES

Assessment and collection of civil money penalties has assuredly become one of the dominant regulatory activities of the federal government. As Exhibit 1B indicates,[90] federal agencies collected over $52,000,000 in some 360,000 civil penalty cases during 1977. While historical comparisons are difficult because of differences in the data base, it seems evident that administrative penalty collections, in terms of both caseload and dollar amounts, have increased sharply in recent years.[91] It is true that the aggregate figures are most heavily influenced by a handful of agencies—chiefly the Customs Service, and secondarily the Internal Revenue Service, the Mine Safety and Health Administration, and the Occupational Health and Safety Administration. But most federal regulatory agencies—seven departments, representing 21 major administrative units, and 12 independent agencies—reported at least some civil money penalty collections as part of their enforcement programs. Average collections per case vary widely among agencies (see Exhibits 2A and 2B).[92] Of the agencies and major departmental subdivisions for which data is available, most (8) averaged between $1,000 and $5,000 in recent years while several others (5) averaged between $500 and $1,000 (4). While a handful of agencies (4) averaged above $20,000 per case, these are all agencies with a very small annual caseload.

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[87] *See, e.g.*, 49 C.F.R. § 1021.2(a) (1978) (ICC). *But cf.* 33 C.F.R. § 25.1603 (1978) (Coast Guard).

[88] *See* note 59 *supra*.

[89] *See* 4 C.F.R. §§ 103.1–103.9 (1978); pp. 335–36 *infra*.

[90] *See* pp. 356–57 *infra*.

[91] Professor Goldschmid found that federal agencies collected $9,506,568 in 62,977 cases in fiscal year 1970. Goldschmid, *supra* note 6 at 954, 956. These totals include, however, only partial data for several agencies, (including the Customs Service) and no data for several others (including the IRS and Labor Department). Goldschmid also includes an enormous quantity of Postal Service claims which I excluded as contract claims (penalties imposed under the terms of mail transportation contracts with carriers). If one compares only those federal agencies for which apparently complete and comparable data are reported in both the Goldschmid study and the present study, the 1970 to 1976 caseload growth is 68 percent and the growth in collections is 163 percent. These figures greatly understate the total growth since two of the largest penalty programs—OSHA and MSHA—had barely begun at the time of the previous report and are not reflected in the foregoing comparison.

[92] *See* pp. 358–59 *infra*.

The civil money penalty is often viewed as a supplement to other regulatory sanctions, such as criminal penalties or license revocation.[93] In fact, 45 per cent of the offenses for which civil money penalties may be invoked are also subject to criminal penalties; 11 per cent are subject to license or permit revocation or suspension; 22 per cent are subject to a prohibitory judicial or administrative order; and 46 per cent may result in seizure or forfeiture of property.[94] Yet the traditional view of civil money penalties as a purely supplemental sanction understates its actual importance in the enforcement program of most federal agencies. Most agencies use civil money penalties far more often than other sanctions, even in some cases for relatively serious offenses. In a significant minority (20 per cent) of statutory schemes, it is the only penalty authorized for the specified offense.

The procedures followed by federal agencies in prosecuting civil money penalty claims vary widely. In an attempt to catalog the varieties of agency procedure, survey responses by agencies were coded according to fifteen "enforcement activity" characteristics. The unit for analysis chosen was the individual statutory provision, as enforced by a single "administrative unit"—that is, either an independent federal agency or a major subdivision of a federal department (such as OSHA in the Department of Labor). Since some 22 penalty statutes are enforced by two or more administrative entities, the total number of enforcement "units" (or "procedures") (376) is greater than the number of "statutes" (348). For purposes of the following discussion, and the tables in Exhibits 3A through 8B,[95] the term "statutory provision" should be interpreted in this light.

The United States Coast Guard enforces the largest number of civil penalty statutes (106). The other agencies enforcing more than ten are the IRS (63), the Customs Service (41); the EPA (15), the INS (14), the FCC (14) and the ICC (11). Exhibits 3A through 5B indicate the size and selected characteristics of the statutory mandate of each federal agency. Exhibits 6A through 8B provide selected information on the procedures used by agencies to enforce these statutory provisions. Every agency claimed to give written notice of the alleged violation to the violator. Agencies vary, however, in the extent to which and detail with which they provide a statement of written reasons for the assessment of a penalty, stating the basis for the finding of a violation and the basis for the penalty calculation. Although the agencies' survey responses were not always easy to interpret, it appeared that agencies provide a relatively complete statement of reasons in the process of enforcing some 76 per cent (288) of all penalty provisions.[96] With a somewhat lower frequency (68 per cent of the enforcement procedures), agencies claim to afford respondents at least some form of oral hearing on the assessment.[97] A formal trial-type hearing is made available in conjunction with 51 (14 per cent) of the penalty provisions. Thirty of these procedures are based on statutes expressly requiring a formal hearing; 18, on statutes requiring an unspecified ''hearing''; and 3, on statutes which are silent on the procedures to be followed. The procedures used to enforce another 203 statutory provisions (54 per cent) include an opportunity for some form of informal hearing. Based on the often elliptical answers given by agencies to survey questions, it appears that about three-quarters of these ''hearings'' include a right to present witnesses and are conducted by an impartial employee of the agency. Agencies enforcing ''notice and opportunity for hearing'' statutes have interpreted ''hearing'' as requiring a trial-type hearing in 18 cases, and as requiring only an informal hearing in 17 cases.

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[93] It was clearly so viewed, for example, by Louis Jaffe writing fourteen years ago. Jaffe, *supra* note 2 at 114.

[94] *See* Exhibit 5B, p. 365 *infra.*

[95] *See* pp. 360–71 *infra.*

About 65 per cent of the enforcement procedures include a right to submit an appeal to a higher level of the agency, from an initial decision denying a request to cancel or mitigate a penalty.[98] The availability of an administrative appeal correlates highly with the formality of the assessment procedure. Most ''no-appeal'' procedures (58 per cent) also involve no administrative hearing of any type, and most of the rest (33 per cent) involve highly informal ''conference''-type hearing only. Most of these cases involve ''court-assessment'' penalties which the agency makes only a single effort to negotiate. The ''assessment'' in those cases is the initial settlement demand. If the respondent is unhappy with the deal offered, his only recourse is to await prosecution and make his defense to a court.

It is somewhat surprisingly rare for agencies to publish criteria for calculating the dollar amount at which to assess or by which to mitigate a penalty.[99] Agencies have written standards to assist in the enforcement of 123 (33 per cent) of the penalty authorities. In 63 of these cases, the agency has merely enumerated criteria to be considered in making the decision, without indicating the relative weights to be attached to them, while in 60 cases agencies have provided a fairly specific rule for translating decisional factors into a dollar amount. Interestingly, agencies rarely go beyond the enumeration in the statute to establish their own more specific regulatory criteria.[100]

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[96] *See* Exhibits 6A and 6B, pp. 366–67 *infra.*

[97] *Id.*

[98] *Id.*

[99] *See* Exhibits 7A and 7B, pp. 368–69 *infra.*

[100] They have done so on only nine occasions.

In making penalty assessment or mitigation decisions, agencies claim to use prior decisions as precedent under 63 per cent of the statute.[101] Agencies claim to follow precedent "always" in enforcing 51 (14 per cent) of the statutes, and to follow precedent "sometimes" in enforcing 185 (50 per cent) of the statutes. As expected, the use of prior assessment decisions as precedents correlates highly with the formality of procedures—particularly, of course, with the right to some sort of hearing and the provision of a written statement of reasons for assessment or mitigation decisions.

The five procedural variables just discussed (written reasons, hearing, administrative review, standards, and precedents) tend to cluster in recognizable patterns. At one extreme end of the spectrum are those penalty assessment systems which provide all five of the procedures. This might be called the "formal" or "adjudicatory" end of the spectrum.[102] There are 20 procedural systems having these characteristics.[103] If one relaxes the requirement of published criteria (but retains the partially co-functional requirement of the use of precedents), another 34 procedures fall into the "adjudicatory" classification. At the other extreme are administrative penalty-imposition processess which include none of the five listed procedures. These, one might designate as "bargaining" or "prosecutorial" procedures. There are 43 "pure" bargaining procedures in use. If one includes procedures featuring the use of either an informal hearing or occasional use of precedents, another 16 procedures fall onto the "bargaining" side of the spectrum's midpoint. The remaining procedures fall into the "mixed" category. The relative distribution of procedural "models" is approximately as follows:

Model	Number	Per Cent
Pure Adjudicatory	20	12
Quasi-Adjudicatory	34	21
Mixed	52	31
Quasi-Bargaining	16	10
Pure Bargaining	43	26
Total	165	100

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[101] *See* Exhibits 7A and 7B *infra.*

[102] For a comparable effort to discern procedural "clusters" in the practices of federal agencies, see Verkuil, *A Study of Informal Adjudicative Procedures,* 43 U. Chi. L. Rev. 739 (1976).

[103] In order to prevent the Coast Guard, IRS and Customs Service from swamping the data, I have arbitrarily reduced the number of "statutes" enforced by each, for purposes of the "cluster" analysis in the text. I have collapsed all of the 97 penalties enforced by the Coast Guard under the old shipping laws into one "statute," all of the 41 customs statutes into one "statute," and all of the 63 internal revenue statutes into two "statutes" (representing the two major types—those enforceable in Tax Court, and those enforceable in a district court).

Although most agencies have a highly decentralized process for detecting and investigating violations of their laws, penalty assessment responsibility tends to be somewhat more centralized.[104] Although 65 per cent of penalty procedures involve decentralized assessment, most of these (203 of 244) are enforced by three agencies: the Coast Guard, the IRS and the Customs Service. Most agencies (32) assess all or most of their penalties on a centralized basis; only a few (9) rely on a primarily or exclusively decentralized process.

Few agencies have established any formal quality control system for evaluating the accuracy, consistency and substantive correctness of assessment and mitigation decisions.[105] Most agencies simply rely on a system of administrative appeals to monitor quality. Only 79 penalty enforcement procedures include any kind of systematic procedure for auditing assessment and mitigation decisions as a means of checking on their quality. Most of these statutes (63) are enforced by the IRS. Only 12 of the remaining 181 decentralized-assessment procedures utilize a systematic audit process.

An attempt was made to develop crude measures of the performance of the various penalty-collection procedures in use. Three measures were developed: (1) "final assessment ratio" (ratio of the average amount finally assessed by the agency per case to the average amount initially assessed per case); (2) "collection ratio" (ratio of the average amount finally assessed per case to the average amount collected per case); and (3) "penalty percentage" (percentage of closed cases in which at least some penalty was collected). Unfortunately, relatively few agencies were able to provide all of the data necessary to make these calculations, and still fewer could furnish data broken down by source of statutory authority. As a consequence, final assessment ratios and collection ratios could be computed for only 26 penalties and penalty percentages for only 32. The median final assessment ratio was about 70 per cent with reported ratios clustering between 40 and 80 per cent, although the ratio for six penalties was over 95 per cent. Collection ratios were much higher: in 19 of the 26 cases the ratio exceeded 95 per cent. These 19 cases represented a broad cross-section of procedural types. The "penalty percentage" figures tended to cluster at the top and middle of the range. The penalty percentage exceeded 95 per cent in 20 cases and fell between 40 and 69 per cent in 10. Since the samples are so small, no attempt was made to correlate reported values with procedural or statutory variables. Any conclusions about the performance of penalty collection procedures must rest on the results of the more detailed case studies.

V. Case Study I: Mine Safety

Statutory Framework

During this century the federal role to protect the health and safety of miners has grown steadily. For most of that time, federal policy has focused on the coal mining industry. Beginning with the creation of the Bureau of Mines within the Department of the Interior in 1910,[106] Congress gradually expanded the Interior Department's regulatory jurisdiction over coal mining, authorizing federal inspections in 1941,[107] promulgation of advisory safety codes in 1947,[108] and issuance of closure and withdrawal orders in 1952.[109] The greatest single expansion of regulatory authority occurred, however, as a result of the Federal Coal Mine Safety and Health Act of 1969.[110] Enacted largely in response to a series of fatal accidents including the infamous Farmington Disaster of 1968, the Act provided for the establishment of mandatory health and safety standards,[111] required more frequent periodic inspection of mines,[112] established a system of disability benefits for victims of black lung disease,[113] and expanded the federal commitment to research and development.[114] In addition to retaining the federal power to close mines presenting imminent health hazards, the Act authorized the imposition of both civil and criminal penalties as sanctions for violating mandatory health and safety standards. Willful violations were made subject to a criminal fine of up to $25,000 or imprisonment for up to one year or both.[115] The most important sanction, however, was clearly the civil money penalty. The Act directed the Secretary to assess a civil penalty of up to $10,000 per violation for every violation of the standards.[116] In determining the amount of the penalty, the Secretary was instructed to consider six enumerated factors, including:

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[104] *See* Exhibits 8A and 8B, pp. 370–71 *infra.*

[105] *Id.*

> the operator's history of previous violations, the appropriateness of [the] penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.[117]

The Act required the Secretary to give the violator "an opportunity for a public hearing" on the violation and to issue a "decision, incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted . . . ."[118] The statute specified that the hearing "be of record" and "be subject to Section 554 of Title 5" (section 5 of the Administrative Procedure Act[119]). An unpaid assessment order was enforceable in a de novo trial in federal district court in which the respondent could request a jury trial of contested factual issues.[120] The Interior Department enforced the 1969 Act primarily through the Bureau of Mines until 1973, when it established the Mine Enforcement and Safety Administration (MESA) as an independent departmental unit.[121] Civil money penalty assessment hearings were conducted in the manner previously established for mine closure orders: the case was heard by an administrative law judge (ALJ) in the Department's Office of Hearings and Appeals, and ALJ decisions were subject to appeal to the Department's Board of Mining Operations Appeals.

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[106] Organic Act of 1910.

[107] Pub. L. 77–49, §§ 1–12, 55 Stat. 162 (1941).

[108] Pub. L. 80–328, § 1, 61 Stat. 450 (1947).

[109] Pub. L. 82–522, § 1–2, 66 Stat. 703 (1952).

[110] Pub. L. 91–173, 83 Stat. 742 (1969), *as amended,* 30 U.S.C. § 801 *et seq.* (Supp. 1977).

[111] Section 101, *as amended,* 30 U.S.C. § 811 (Supp. 1977).

[112] Section 103, *as amended,* 30 U.S.C. § 813 (Supp. 1977).

[113] Section 401 *et seq., as amended,* 30 U.S.C. § 901 *et seq.* (Supps. 1977, 1978).

[114] Section 501, *as amended,* 30 U.S.C. § 951 (Supp. 1977).

[115] Section 109(b), *as amended,* 30 U.S.C. § 820(d) Supp. 1977).

[116] Section 109(a)(1), *as amended,* 30 U.S.C. § 820(a) (Supp. 1977).

[117] Section 109(a)(1), *as amended,* 30 U.S.C. § 820(i) (Supp. 1977).

The regulatory structure was further modified by the Federal Mine Safety and Health Amendments Act of 1977,[122] whose principal objectives were to expand regulatory jurisdiction to non-coal mines and to transfer the responsibility for enforcement from the Department of the Interior to the Department of Labor. All powers relating to promulgation of standards, issuance of orders and assessment of penalties formerly exercised by the Secretary of the Interior were transferred to the Secretary of Labor.[123] Emulating the structure established for regulation of non-mine workplace safety by the Occupational Safety and Health Act of 1970,[124] the 1977 amendments provide for the creation of an autonomous review board, called the Federal Mine Safety and Health Review Commission (MSHRC),[125] to review any order issued by the Secretary, including an order proposing a civil money penalty. MSHRC consists of five members appointed to staggered six-year terms by the President with the advice and consent of the Senate. MSHRC employs administrative law judges who "shall hear, and make a determination upon any proceeding instituted before the Commission."[126] A person aggrieved by an ALJ decision may petition for discretionary review by the Commission.[127] Finally, the 1977 Act significantly changes the form of judicial review of an administrative penalty assessment. A final order of the Commission is subject to review in a Court of Appeals at the behest of any "aggrieved" party.[128] The Secretary may apply to a Court of Appeals for enforcement of a MSHRC order.[129] If such an enforcement proceeding is brought after the deadline for a review petition. MSHRC's findings of fact and order shall be "conclusive."

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[118] Section 109(a)(3) *as amended,* 30 U.S.C. § 815(d) (Supp. 1977).

[119] 5 U.S.C. § 554 (1976).

[120] Section 109(a)(4).

[121] The enforcement process during the early years after the 1969 Act is described in Turner, *Penalty Assessment and Appeal Procedures Under the Federal Coal Mine Health and Safety Act,* 18 Rocky Mtn. Min. L. Inst. 121 (1973).

[122] Pub. L. 95–164, 91 Stat. 1290 (1977).

[123] *See* 30 U.S.C. § 961 (Supp. 1977).

[124] Pub. L. 91–596, 84 Stat. 1606 (1970), 29 U.S.C. § 651 *et seq.*

[125] 30 U.S.C. § 823 (Supp. 1977).

[126] 30 U.S.C. § 823(d)(L) (Supp. 1977). The administrative hearing is governed by the provisions of section 5 of the APA, but the exemption in § 5(a)(3) for "proceedings in which decisions rest solely on inspections, tests, or elections" is expressly made inapplicable to mine safety penalty hearings. 30 U.S.C. § 815(d) (Supp. 1977).

Following passage of the 1977 amendments, MESA transferred its operating responsibility for enforcement activities—inspection and initial penalty assessment—to a new division of the Labor Department called the Mine Safety and Health Administration (MSHA). Although the Act for the first time requires health and safety standards to be applied to non-coal mines, MSHA's enforcement process continues to follow the pattern established in the regulation of coal mining.

B. *Penalty Standards*

Before describing the procedure followed for assessing and adjudicating civil monetary penalties, it is important to discuss the standards applied by MSHA in assessing penalties. Since 1970, the responsible enforcing agencies have gradually evolved a detailed set of criteria for determining the amount, up to the statutory maximum of $10,000, at which to assess a particular violation. The most recent stage of this evolution is embodied in regulations promulgated in May of 1978.[130] Most violations are assessed according to a "regular assessment" method, which specifies a range of "penalty points" to be assigned for each of five statutory factors, and a conversion table for converting the resulting total number of points into a dollar figure.[131] The five factors are: "size of the operator's business" (up to 15 points, based on the size of both the mine and the "controlling company," as measured by annual tonnage or hours worked)[132]; "history of previous violations" (up to 20 points, based on the number of violations assessed and average number of violations assessed per inspection day, during the past 24 months)[133]; "negligence" (up to 25 points)[134]; "gravity" (up to 20 points based on the probability of an accident, the severity of the injuries likely to occur, and the number of employees likely to be affected)[135]; and "demonstrated good faith" in taking corrective action (from −10 to +10 points).

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[127] 30 U.S.C. § 823(d)(2)(A) (Supp. 1977).

[128] 30 U.S.C. § 816(a)(1) (Supp. 1977).

[129] 30 U.S.C. § 816(b) (Supp. 1977).

[130] 43 Fed. Reg. 23514–19 (May 30, 1978), *amending* 30 C.F.R. Part 100.

[131] 30 C.F.R. § 100.3, *as amended by* 43 Fed. Reg. 23517 (1978).

[132] 30 C.F.R. § 100.3(b), *as amended by* 43 Fed. Reg. 23517 (1978). Penalty points for coal mines are assessed on the basis of annual tonnage worked; for non-coal mines, on the basis of annual hours worked. MSHA concedes that "annual hours worked" is the preferable measure, since it interprets "size" to mean level of "worker exposure." Apparently MSHA did not adopt "annual hours" in the coal industry for lack of information. *See* 43 Fed. Reg. 23514-15 (1978). Up to ten points may be assessed for the "size" of the mine and up to five for the "size" of the "controlling company." As a result, nonmining activities of the controlling company are disregarded—a position consistent with MSHA's reading of "size" to mean exposure level, not ability to pay.

The assignment of penalty points for "size" and "history" is mechanical. To assist assessors in assigning points for "negligence," "gravity," and "good faith," MSHA has promulgated a manual providing more detailed guidance and helpful examples.[136] The sixth statutorily enumerated factor—the effect of the penalty on the operator's ability to continue in business—is not incorporated into the basic penalty assessment. The regulations "initially presume" that a penalty determined by the formula will not adversely affect the operator's ability to remain in business. It is up to the operator to rebut that assumption by requesting mitigation of the penalty and providing information to substantiate his claim.[137]

When MESA first constructed an assessment formula, it designed the conversion table so that the average number of points assessed per violation would convert to the average penalty then being assessed by the Department's ALJs (then about $80). In its 1978 revision, MSHA attempted to raise the general assessment level so that an average violation would generate a $200 penalty.[138] Still, the conversion table is skewed markedly toward the lower end. A one-point increment in penalty points produces a $2 increment in penalty liability at the low end and a $500 increase at the upper end. One half of the possible penalty points (50) corresponds with a penalty representing only 3.5 per cent of the maximum penalty ($345 as compared to $10,000).[139]

In addition to its "regular assessment" method, the MSHA rules authorize the use of a "special assessment" procedure which may be used by the agency whenever the regular formula does not produce "an appropriate penalty."[140] The regulation enumerates several illustrative categories, such as fatalities, patterns of recurring violations, or prolonged noncompliance, but otherwise places no constraint on the agency's discretion to proceed by special assessment. The only standard specified for making a special assessment is a requirement that the six statutory factors be taken into account and that all findings be "in narrative form." In practice, MSHA uses the "special assessment" approach in all fatality and serious injury cases and in at least some cases of "unwarrantable failure" to comply with mandatory standards.

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[133] 30 C.F.R. § 100.3(C), *as amended by* 43 Fed. Reg. 23517 (1978). Up to five points may be assessed for number of previous violations and up to ten for number per inspection day.

[134] The rules provide for the assignment of from one to 20 points for "ordinary negligence" and from 21 to 25 for "gross negligence." 30 C.F.R. § 100.3(d), *as amended by* 43 Fed. Reg. 23517-18 (1978).

[135] 30 C.F.R. § 100.3(e), *as amended by* 43 Fed. Reg. 23518 (1978). Up to ten points may be assigned for each of the three criteria. The maximum possible number of points would be assigned if an event "occurred," causing a "fatal" injury to more than nine persons. A "probable" accident which would cause three workers to lose work days, by comparison, would be assessed ten points (3 + 3 + 4).

[136] Mine Enforcement and Safety Administration, Office of Assessments, Standardization of Assessments (1977).

[137] 30 C.F.R. § 100.3(h), *as amended by* 43 Fed. Reg. 23519 (1978).

[138] Table I, *infra,* indicates that, for cases closed in calendar 1978 the average initial assessment per violations was $123. Since the revised penalty schedule became effective in March of 1978, many of these cases were based on the former schedule.

[139] 30 C.F.R. § 100.3(g), *as amended by* 43 Fed. Reg. 23518 (1978).

Until quite recently, MSHA used a set of "sub-formulas" for computing penalties in fatality and serious injury cases that assigned additional penalty points (above the number calculated by the "regular assessment" level) for previous history of violations, size and seriousness of injury. Given the skewness of the conversion table, these additional points dramatically increased the penalty. For example, in one fatality case that I reviewed, the special formula, by increasing the penalty point assessment by 22 points, increased the dollar assessment by $1,060 ($240 to $1,300).[141] For "unwarrantable failure cases, MSHA used a formula showing permissible penalty ranges (the maximum usually being twice the minimum) depending on size of business and type of offense. MSHA discontinued the use of these special formulas late in 1978. MSHA assessors now use no written formulas in generating special assessment figures, depending, instead, on what one official called an "eyeball assessment" approach, based upon an intuitive sense of what is a fair penalty and what an administrative law judge might award.

MSHA uses the special assessment method in only a small number of cases. In cases closed during calendar year 1978 only 1.3 per cent of the violations had been assessed by the special assessment method and 98.7 per cent by the regular method (see Table I). Nevertheless, Madison McCulloch, Director of the Office of Assessments, indicated that he would use the special assessment method more frequently if staff resources permitted, since he views it as a better way to generate a just assessment than a mechanical formula. The principal constraint on its use is staff resources. The special assessment method consumes greater staff resources than the regular assessment because it often builds upon the regular method and because persons subjected to a highly discretionary assessment are more likely to demand time-consuming explanatory or participatory proceedures.[142]

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[140] 30 C.F.R. § 100.4, *as amended by* 43 Fed. Reg. 23519 (1978).

[141] MESA v. Consolidated Coal Company, Docket No. VINC 77-131-P (1977). The penalty assessment was based on the old conversion schedule. Using the 1978 schedule, the "regular" assessment would have been $560 and the "special" assessment $1,700. The case went to hearing before an ALJ. The Solicitor of Labor rejected MESA's assessment as too *low* (a highly unusual occurrence according to MSHA officials) and sought and obtained a penalty assessment of $10,000.

[142] *See* Table I and pp. 239–40 *infra*.

TABLE I

MINE SAFETY AND HEALTH ADMINISTRATION NUMBER OF CASES AND VIOLATIONS, BY TYPE OF ASSESSMENT AND STAGE AT WHICH CASE CLOSED, COAL AND NON-COAL MINE PENALTY CASES CLOSED WITH PAYMENT, CALENDAR 1978[1]

State at Which Case Closed	Regular Assessment Cases			Special Assessment Cases			All Cases		
	Cases	Viols.[2]	% Viols. Closed[3]	Cases	Viols.	% Viols. Closed	Cases	Viols. Viols.	% Viols. Closed
Direct Payment	5100	15489	12	55	67	4	5155	15556	12
Conference[4]	16048	103740	80	761	1071	64	16809	104811	80
Solicitor Settlement[5]	1926	4649	4	285	431	26	2211	5080	4
ALJ: Adversary[6]	55	187	(*)	42	64	4	97	251	(*)
ALJ: Summary[7]	63	396	(*)	6	6	(*)	69	375	(*)
MSHRC[8]	2	2	(*)	0	0	0	2	2	(*)
Justice Settlement[9]	1134	6283	5	23	29	2	1157	6312	5
Court: Default[10]	7	37	(*)	0	0	0	7	37	(*)
Court: Decision[11]	0	0	0	0	0	0	0	0	0
Total	24335	130756	100	1172	1668	100	25507	132424	100

1. Source: MSHA, R20-Payment Activity Report, from January 1, 1978 to December 31, 1978.
2. Number of violations of mandatory safety and health standards cited.
3. Percentage of violations closed at the indicated stage.
4. Penalty paid after conference.
5. Contested case closed by Solicitor settlement before hearing.
6. Penalty paid after ALJ decision following contested hearing.
7. Penalty paid after ALJ decision following summary dismissal or summary judgment for failure to prosecute a contest.
8. Penalty paid after final decision of MSHRC on appeal from ALJ decision.
9. Case referred to Department of Justice for collection, closed by settlement. MSHA officials estimate that 60% of referrals represent cases uncontested at MSHA and 40% represent cases contested before MSHRC but unpaid after ALJ or MSHRC order.
10. Penalty paid after default judgment entered by federal court.
11. Penalty paid after decision of federal court in contested case.

* Less than .5 percent.

C. Penalty Imposition Process

1. Inspections

With that introduction to the assessment criteria employed, we turn our attention to the assessment procedure. The enforcement process begins with an inspection carried out by an inspector assigned to one of the nine MSHA enforcement districts. There are three types of inspections: inspections made in response to a complaint or reported incident, periodic cycle inspections, and special "impact" inspections. While complaint-based inspections have priority, mines are subject to frequent periodic inspections. The Act requires MSHA to conduct unannounced inspections of each underground coal mine, for example, at least four times per year and of each surface coal mine at least twice per year.[143] Mines identified as presenting unusual hazards are subject to more frequent inspections (as often as once per day).[144] In 1976 MESA employed 1210 inspectors to monitor some 1,900 underground coal mines, 2,500 surface coal mines, and 1,100 other surface coal-processing operations.[145] Between 1972 and 1976, MESA averaged over 73,000 annual coal mine inspections.[146]

Inspectors enforce a wide variety of health and safety standards, relating to the design, construction and operation of the mine structure, machinery, and equipment. Although the number of inspectors declined somewhat from 1973 to 1976, the number of violations detected increased dramatically during that period (from 71,155 to 139,007).[147] The most common violations cited by mining inspectors in underground mines during 1976 were those relating to standards for electrical equipment (31 percent), ventilation (13 per cent), accumulation of combustible materials (11 per cent), fire protection (9 per cent), and roof support (9 per cent).[148] In surface mining operations, the most common violations concerned standards for mechanical equipment (22 per cent), fire protection (12 per cent) and loading and haulage procedures (11 per cent). Most of these violations can be detected through the use of testing devices or by direct observation.[149]

If an inspector detects a violation, he issues a citation notice to the mine operator which must "describe with particularity the nature of the violation" and "fix a reasonable time" for its abatement.[150] After the abatement period passes, the inspector reinspects and, based upon the results of that inspection, issues an "abatement" report to the operator signifying that the violation has been satisfactorily abated, requiring further corrective action, or ordering closure of the mine. The inspector then prepares an investigation report which describes the violation and the operator's corrective action. In the early days of the money penalty program, the inspector also calculated the amount of the proposed penalty and issued a notice to the operator assessing that amount. The General Accounting Office criticized this practice as producing inconsistent assessment levels.[151] As a result, in 1973 MESA centralized the penalty assessment function. Under the new system, the inspector merely prepares a narrative description of the conditions directly observed by him relating to the gravity of the violation, operator's negligence and operator's good faith corrective action.

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[143] 30 U.S.C. § 813(a) (Supp. 1977).

[144] 30 U.S.C. § 813(i) (Supp. 1977).

[145] 1976 MESA Ann. Rep. 19.

[146] *Id.* at 17.

[147] *Id.*

[148] *Id.* at 18.

[149] *Id.*

[150] 30 U.S.C. § 814(a) (Supp. 1977).

2. *Initial Review*

The district office then transmits the inspector's report, coupled with copies of the citation and abatement reports, to the Office of Assessments, at Wilkes-Barre, Pennsylvania, for processing. There, "assessment officers" review the inspection reports for correctness, thoroughness, and persuasiveness, and compute penalty points for gravity, negligence and good faith. There are approximately 18 assessment officers in the Wilkes-Barre office. Assessment officers are required to have had at least three years' experience as a mining inspector. After review of the violation report, data on the violation are entered into MSHA's computer-based information system which automatically adds penalty points for operator size and previous history of violations. The system sums up the points assigned for the five categories and converts the total into an "initial review" penalty amount.

The information system has several programs to convert "violations" into "cases." All "special assessment" violations discovered in a single inspection are immediately combined into a single case. The average special assessment "case" consists of one to three violations. The mean number of violations per special assessment case is 1.4[152] "Regular assessment" violations, on the other hand, are initially filed in the information system for storage in a suspense file. As soon as 20 violations have accumulated for a single mine, or after 14 days, whichever occurs first, the system combines the accumulated violations into a single "case." The mean number of regular assessment violations per case is about 5.4.[153]

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[151] Comptroller General of the United States, Improvements Needed in the Assessment and Collection of Penalties—Federal Coal Mine Health and Safety Act of 1969 at 24–26 (1972). The GAO later renewed its criticism of MESA for inconcistency in assessments in a 1975 report. Comptroller General of the United States, Improvements Still Needed in Coal Mine Dust-Sampling Program and Penalty Assessments and Collections 42–44 (1975).

[152] *See* Table I *supra.*

[153] *Id.*

Once the computer has established a "case," it prints an initial review document, describing each outstanding violation (by date, standard violated and condition observed) and showing the penalty-point computation and corresponding dollar amount from the conversion table. The Wilkes-Barre office sends the initial review report to the mine operator and the miners' "representative" (usually the miners' union).[154] The initial review letter gives the operator essentially four options: (1) pay the penalty at the specified level; (2) submit additional information; (3) request an oral conference at one of MSHA's nine conference offices; or (4) do nothing. If an operator wishes to submit additional information or request a conference, he must do so within ten days of receiving the initial review document.[155] If MSHA receives no timely reply, it will issue a "proposed assessment" notice, triggering the statutory 30-day period to request a hearing.[156] The miners' representative may also submit additional data or request an oral conference within the 10-day period. Of the cases closed with payment in 1978, 12 per cent were closed by direct payment of the full amount demanded in the initial notice.[157] As one would expect, cases closed by direct payment involved a much smaller average initial assessment per violation ($71) than cases closed at a later stage ($165) (see Table II).

3. *Conference*

MSHA regulations provide that conferences should ordinarily be held within 33 days of serving the "initial review" report and that "it is within the sole discretion of the Office of Assessments to conduct a conference or deny a request for a conference."[158] In practice the Office exercises its discretion to deny a conference request only in extremely rare cases. "Conference specialists" assigned to the field offices conduct the conference. There are approximately 80 conference specialists in the nine districts. Their qualifications and training are the same as those of assessment officers. The mine operator and the miners' representative may be represented by counsel at the conference and introduce witnesses. The parties may inspect the case file (including the inspector's violation report and a computer work-sheet on penalty computation, in addition to the citation and initial review

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[154] 30 C.F.R. § 100.5(b), *as amended by* 43 Fed. Reg. 23519 (1978). The 1977 amendments inserted a requirement that the miners' representative be given a copy of the "proposed assessment" notice (see note 171 *infra*) and an opportunity to participate in a hearing on the assessment. 30 U.S.C. § 815(a) and (d) (Supp. 1977). MSHA has, by regulation, extended that right of participation to the earlier "initial review" and conference stages not expressly mandated by statute.

[155] 30 C.F.R. § 100.5(C), *as amended by* 43 Fed. Reg. 23519 (1978).

[156] 30 U.S.C. § 815(a) (Supp. 1977); 30 C.F.R. § 100.6(a)(1), *as amended by* 43 Fed. Reg. 23519 (1978). For a description of the "proposed assessment" see p. 336 *infra.*

[157] *See* Table I *supra.*

[158] 30 C.F.R. § 100.5(d) and (e), *as amended by* 43 Fed. Reg. 23519 (1978).

TABLE II

MINE SAFETY AND HEALTH ADMINISTRATION AVERAGE AMOUNTS ASSESSED AND PAID BY TYPE OF ASSESSMENT AND STATE AT WHICH CASE CLOSED, COAL AND NON-COAL MINE PENALTY CASES CLOSED WITH PAYMENT, CALENDAR 1978[1]

	Regular Assessment Cases			Special Assessment Cases			All Cases		
Stage at Which Case Closed[2]	IR Amt/ Viol ($)[3]	Amt Pd/ Viol ($)[4]	Collect Ratio (%)[5]	IR Amt/ Viol($)	Amt Pd/ Viol ($)	Collect Ratio (%)	IR Amt/ Viol ($)	Amt Pd/ Viol ($)	Collect Ratio (%)
Direct Payment	68	68	100	655	655	100	71	71	100
Conference	133	100	75	1987	1018	51	152	110	72
Solictor Settlement	110	56	51	4122	1861	45	450	209	46
ALJ: Adversary	167	116	69	5171	1755	34	1444	534	37
ALJ: Summary	76	76	100	3842	3008	78	142	129	91
MSHRC	119	112	94	0	0	—	119	112	94
Justice Settlement	95	71	75	869	516	59	98	73	74
Court: Default	28	29	104	0	0	—	28	29	104
Court: Decision	0	0	0	0	0	—	0	0	0
Total	123	94	76	2595	1248	48	154	108	70

1. Source: MSHA, R20-Payment Activity Report, from January 1, 1978 to December 31, 1978.
2. For definition of terms, see Table I *supra.*
3. Average "initial review" assessment amount per violation.
4. Average amount paid per violation.
5. Ratio of amount paid to initial review assessment.

documents previously served on the operator), but MSHA does not ordinarily present its own witnesses (such as the inspector). The conference specialist is instructed always to resolve an issue of credibility or accuracy of observation in favor of the inspector (as reflected in his reports). If the operator alleges a significant omission of fact not involving the inspector's credibility or interpretation of evidence, the conference specialist may request further information from the inspector after the conference. No transcript is kept nor are witnesses sworn.

Participants may present arguments concerning the existence of the violation and the appropriateness of the "initial review" penalty amount. On the latter subject, the parties may address any of the five factors considered in computing the penalty. In addition, the operator may present information and argument concerning the sixth statutory factor, ability to pay. Based on the results of the conference, the conference specialist may cancel the penalty assessment altogether, if he finds that no violation has occurred, or he may reduce the penalty amount based on a recomputation of penalty points for any of the original five factors. Conference specialists may also reduce the penalty on grounds of inability to pay, but have oral instructions not to make "substantial" reductions (roughly, 50 per cent or more) without prior approval from MSHA's central office.

The conference is an administrative creation. It is not required by statute. Conferences were first authorized in 1974.[159] Prior to that time, if an operator resisted paying the proposed penalty, MESA (or its predecessor, the Bureau of Mines) referred the case to the Interior Department's Office of Solicitor to prosecute a hearing before the Office of Hearings and Appeals. Although most cases were in fact settled before hearing, an enormous backlog developed in the Solicitor's Office because of limitations on the number of departmental attorneys available for mine safety cases and, of course, limitations on the number of ALJs. Mine operators found it in their interest simply to wait until the department finally got around to their case. The department was publicly criticized on a number of occasions, by the General Accounting Office[160] and in legislative hearings,[161] for allowing huge backlogs to develop. A 1975 GAO report, for example, found that after an average elapsed time of 16 months, only 18 per cent of civil money penalty cases had been settled (only 16 per cent had been paid).[162] Through penalty cases had been settled (only 16 per cent had been paid).[162] Through January 1975, MESA had collected only 23 per cent of the amounts assessed under the 1969 Act.[163] In a concerted effort to reduced the backlog, the Department was forced to settle cases for extremely low amounts. The 1975 GAO report found an average 65 per cent reduction rate in a random sample of cases settled by the Solicitor during 1974.[164] As late as 1976 and 1977 MSHA was settling backlog cases (initially assessed before 1975) at about half the collection rate (36 per cent, as opposed to 72 per cent) of current cases.[165]

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[159] *See* 1976 MESA Ann. Rep. 34.

[160] *See* Comptroller General fo the United States, Improvements Needed in the Assessment and Collection of Penalties—Federal Coal Mine Health and Safety Act of 1969 at 11–12, 21–23 (1972).

[161] *See, e.g., Health and Safety in the Coal Mines, Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare,* 91st Cong., 2d Sess. at 223 (1970); *Hearings on S. 717 Before the Subcommittee on Labor of the Senate Committee on Human Resources,* 95th Cong., 1st Sess. at 157–58, 338 (1977).

[162] Comptroller General of the United States, Improvements Still Needed in Coal Mine Dust-Sampling Program and Penalty Assessments and Collections 41 (1975).

Table I suggests that mine operators demand conferences in a surprisingly large percentage of cases. Cases closed after a conference or at some subsequent stage in the process comprise over 85 per cent of all violations assessed.[166] As an index of the propensity to challenge initial assessments, however, this figure is deceiving. The average "case" contains 5.2 violations.[167] A mine operator may seek a conference on as few as one of the violations contained in a single "case." Yet, since MSHA does not accept partial payment of an initial review assessment, all of the violations contained in such a case are recorded by MSHA as violations for which a conference was requested. This statistical overstatement is most pronounced in the regular assessment category where at least half of the violations paid after conference are not in fact contested. Consequently, the overall propensity of mine operators to challenge initial assessments is probably closer to 40 per cent than 85 per cent. Nonetheless, even this figure seems unusually high given the modest amounts typically assessed and the relatively mechanical standards of liability and assessment used.

One suggested explanation for the high demand for participatory procedures is the peculiar character of mine operators. There is a very large number of small operators in the industry, many of whom move into and out of the industry fairly frequently. They constitute a uniquely independent-minded breed of entrepreneurs whose understanding of and tolerance for governmental intervention are reputed to be quite low. This group may view a penalty of even a few hundred dollars as excessive. For the small mine operator, the oral conference may serve as much of a cathartic and educational function as anything else. A second theory has been suggested to explain the demand by large-scale mine owners for conferences. There are many mine owners who own a network of relatively small, scattered mines, who are not always familiar with daily operations at their mines. To the extent that such absentee owners are surprised to hear allegations of violations at their mines, the conference affords them a chance to ascertain the strength of the government's case.

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[163] *Hearings on S. 1302 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare,* 94th Cong., 2d Sess. at 442 (1976).

[164] Comptroller General of the United States, *supra* note 162 at 41.

[165] MESA, Monthly Activity Report for the Month of December 1976 at 3, January 18, 1977; MESA, Assessment Activity Report for the Month of December 1977 at 3, January 31, 1978.

[166] Based on the assumption that conferences were held in all cases closed at the "conference", "solicitor settlement, "ALI" and "MSHRC" stages, plus 40% of the "Justice settlement" cases. For the basis of the latter figure, see Table I, n.9 *supra.*

[167] *See* Table I *supra.*

Whatever the reasons for the high level of demand for explanatory and participatory procedures, MSHA's conference procedure seems to be an efficient means of satisfying it. In 1978, 80 per cent of all violations closed with payment were closed after a conference.[168] Of the cases in which conference was requested, approximately 93 per cent of the violations were closed with payment after the conference without the necessity for further proceeedings.[169] The conference system is also remarkably expeditious. District offices conduct conferences within the regulatory 33-day guideline in over 98 per cent of all cases. As a result of cancelling assessments for some violations and reducing assessments for others, conference officers collect about 72 per cent of the amounts initially assessed.[170]

4. *Hearing*

After a conference (or after reviewing any written material submitted in lieu of a conference request), the conference officer prepares a "proposed assessment" letter which contains essentially the same information as the "initial review" letter, indicating the recomputed penalty. A copy of the proposed assessment letter is mailed to the operator and to the miners' representative. The operator has 30 days from receipt of the letter to notify MSHA of his intent to contest the assessment.[171] If he fails to contest the proposed assessment within that period, the assessment becomes a final order of the Commission and not subject to review by a court. The case is then referred directly to the Justice Department for collection. If the operator files a timely notice of contest, MSHA refers the case to the Office of the Solicitor of Labor for further action. Before the 1978 reorganization, the Solicitor of the Interior exercised broad prosecutorial discretion whether to take the case to hearing or to settle the case. Since the reorganization, however, MSHRC has taken the position that the filing of a notice of contest by the operator invokes its jurisdiction and, therefore, any settlement by the Solicitor of Labor must receive its approval.[172]

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[168] *See* Table I *supra*.

[169] This figure is derived from Table I. That is, the number of cases closed at the conference stage (5702) is 89% of the total number of violations (113,059) in cases in which an operator had requested a conference.

[170] *See* Table II *supra*.

[171] 30 U.S.C. § 815(a) (Supp. 1977).

[172] *See* 30 U.S.C. § 820(k) (Supp. 1977).

Prior to the institution of the conference process, the Solicitor of Interior resolved approximately 20 per cent of all civil penalty cases by settlement.[173] GAO reports document that the Solicitor's Office accepted sums considerably below the amounts initially assessed.[174] Since the establishment of the conference system, the Solicitor (now, the Labor Solicitor) settles a much smaller percentage of cases. This is particularly true of regular assessment violations, only 4 per cent of which are closed by Solicitor or settlement.[175] The Solicitor continues, however, to settle a large percentage (26) of special assessment cases involving, as they do, larger sums of money and more discretionary judgments.[176]

In settling cases, the Solicitor is more generous than conference officers. Whereas collections for cases settled at the conference stage average 72 per cent of initial assessments, collections at the Solicitor's level average 46 per cent of initial assessments.[177] One would expect a lower collection rate at the Solicitor's level, of course, since the Solicitor, as prosecutor, considers factors such as the probability of a favorable decision by an ALJ and the costs of further proceedings, not considered by the conference officer. The relative amount by which the Solicitor is willing to discount the conference specialist's assessment is considerably greater in regular assessment cases than in special assessment cases.[178] This suggests that the Solicitor views low-penalty cases as less worthy of taking to hearing and thus is willing to make proportionately greater concessions in the interest of settling them. In settling claims averaging only $110, the cost of collection takes on exaggerated importance.

Once the Solicitor files a petition with MSHRC, a hearing is scheduled before one of its ALJs.[179] The hearing is a formal adjudicatory hearing governed by the provisions of section 5 of the APA.[180] The miners' representative is entitled to participate in the hearing as a party, although it may not initiate a hearing.[181] The ALJ must issue a decision, which becomes the final decision of the Commission unless the Commission decides, in its discretion, to review the decision either on petition by an aggrieved party or on its own motion.[182] The ALJ hearing process is the most time-consuming part of the administrative process. A staff review of ALJ decisions in 1977 found that the average elapsed time from filing the case to the judge's decision was 275 days. Although these cases antedate the effective date of the 1977 amendments, both the hearing procedure and the personnel carried over from OHA to MSHRC relatively intact. Contested administrative hearings are rare. Based on the cases closed with payment in 1978, only about 2.4 per cent of cases were contested beyond the "Solicitor settlement" stage and only about two in five resulted in adversary hearings.[183] MSHRC ALJs collected an even lower percentage of amounts initially assessed than did the Solicitor. Their greater leniency was wholly attributable to special assessment cases. MSHRC judges do not consider themselves bound by the Secretary's "regular assessment" regulations since the new statute stipulates that the Commission "shall have authority to assess all civil penalties"[184] and in most instances refers to the Secretary's authority merely to "propose" an assessment.[185] It remains to be seen whether the Secretary's recent escalation of regular assessment levels will be followed by the judges.

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[173] Comptroller General of the United States, *supra* note 162 at 41.

[174] *See* p. 234–35 *supra*.

[175] *See* Table I *supra*.

[176] *See* Table I *supra*. The average initial assessment per violation in "special assessment" cases settled at the Solicitor's office ($4,122) is nearly 38 times that of "regular assessment" cases settled at that level ($110). *See* Table II *supra*.

[177] *See* Table II *supra*.

[178] *See* Table II *supra*. Since the "collection percentage" figures at the "conference" and Solicitor settlement" stages apply to wholly different sets of cases (cases closed at specific stage), the two are not directly comparable. But the figures probably give a reasonably reliable index of the "propensity to mitigate" at each administrative level, nonetheless.

[179] 30 U.S.C. § 823(d)(1) (Supp. 1977).

[180] 30 U.S.C. § 815(d) (Supp. 1977). *See* note 126 *supra*.

[181] 30 U.S.C. § 815(d) (Supp. 1977). The miners' representative may, however, initiate a hearing to contest the issuance or terms of a withdrawal order issued under 30 U.S.C. § 814 (Supp. 1977).

5. *Judicial Review*

Final decisions of MSHRC are subject to "substantial evidence" review in federal courts of appeals.[186] The shift from de novo trial to limited judicial review is a significant procedural innovation of the 1977 Act.

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[182] 30 U.S.C. §§ 823(d)(2)(A) and (B) (Supp. 1977). The statute enumerates the exclusive grounds upon which a petition for review may be filed or upon which the Commission may, on its own initiative, order review. In this respect, the Act adopts a model proposed by the Administrative Conference in 1968 to expedite administrative adjudication by reducing the number of discretionary agency reviews of ALJ decisions. *See* 1 C.F.R. § 305.68–6 (1978). *See also* Fauver, *Agenda for Investigation: Should the APA Be Amended to Provide Standards for Agency Review of Administrative Trials?* 1973 Duke L.J. 135. The GAO has recently renewed the call for general legislation to accord greater finality to ALJ decisions. Comptroller General of the United States, Administrative Law Process: Better Management is Needed vi, 13–16 (1978). Since the MSHRC Commissioners had not been appointed at the time research on this project was undertaken, evaluation of this reform must await further developments.

[183] *See* Table I *supra*. The 2.4% figure represents the sum of the violations closed at "ALJ" and "MSHRC" stages, plus an estimated 40% of the "Justice settlements".

[184] 30 U.S.C. § 820(i) (Supp. 1977). The six statutory criteria, formerly a constraint on the Secretary's assessment authority, are now mentioned solely in connection with the Commission's assessment authority.

[185] The term "propose" is used to describe the Secretary's assessment role in 30 U.S.C. §§ 815(a), (b) and (d), 820 (i) and (k) (Supp. 1977). On one occasion, however, the statute uses the unmodified term "assess". 30 U.S.C. § 820(a) (Supp. 1977).

[186] 30 U.S.C. § 816(a)(1) (Supp. 1977).

Experience prior to 1978 seemed to demonstrate the need for change. MSHA officials claim that collection cases were very seriously backlogged at the Department of Justice under the old system. Since 1970 only one jury trial had reportedly been held. The number of cases pending at the Justice Department grew steadily from 4734 at the end of 1976 to 6815 at the end of 1977 to 9157 on May 31, 1978.[187] Of the cases pending in May, 1978, 3771 (41 per cent) were more than 46 months old. While the backlog at Justice grew by 4423 between December 1976 and May 1978, Justice managed to close only 1108 cases. The extent of this backlog was not necessarily an indictment of the Department of Justice, but rather dramatic evidence that a procedure guaranteeing alleged violators a right to de novo jury trial in collection actions is ill-suited to the demands of a high-volume penalty assessment program. The majority of referrals to the Department of Justice are administratively uncontested assessments. The 1977 amendments expressly provide for an expedited procedure to enforce these orders by the entry of a decree by the clerk of the court of appeals.[188] The amendments seem to have had the intended effect: in 1978, the Department of Justice was able to resolve 1164 cases involving 6349 violations.[189]

D. The Regular and Special Assessment Methods: An Empirical Comparison

The data reported in Tables I and II reveal two significant differences in the patterns of assessing and collecting penalties by the regular assessment and the special assessment methods. In the first place, the propensity of mine operators to contest violations appears to be significantly higher for special assessment cases. The percentage of special assessment violations closed with payment is lower at the "direct payment" and "conference" stages, and higher at the "solicitor settlement" and "ALJ adversary hearing" stages, than comparable figures for regular assessment cases. Indeed, since over half of the regular assessment violations closed after conference are not in fact contested,[190] this difference is even greater than the data suggests. The second observed distinction concerns the ratios of amounts collected to amounts initially assessed. At each stage in the procedure for contesting penalty assessments, the collection ratio is lower for special assessment cases than for regular assessment cases.

There are two immediately apparent explanations for these differences. The first is the fact that special assessment cases involve much higher average penalty assessments per violation ($2,595) than regular assessment cases ($123).[191] One would expect propensity to contest assessments to be a function of their face amount. Not only do the differences between regular and special assessment cases reinforce that hypothesis, but the pattern of case resolutions within each of those categories furnishes independent confirmation as well. As a general rule, the later the stage at which a case was closed, the higher its initial assessment. This relationship is strongest in the special assessment category, where the "average initial assessment per violation" figure increases steadily from the direct payment through adversary hearing stages. For regular assessment cases the average initial assessment for cases settled by the Solicitor is somewhat less than the average assessment for cases paid after a conference, but at all other stages the relationship holds.

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[187] *See* authorities cited note 165 *supra*.

[188] 30 U.S.C. § 816(b) (Supp. 1977).

[189] *See* Table I *supra*.

[190] *See* p. 235 *supra*. Since most special assessment cases involve only one or two violations, the reported percentage (4) of special assessment cases closed by direct payment probably represents an accurate indicator of the rate of uncontested payment in this category.

A second explanation for the observed variations between special and regular assessment cases is the nature of the determinations involved. The determination of a penalty amount by the special assessment method involves the exercise of much broader discretion than the application of the regular assessment formula. A respondent is more likely, therefore, to view an assessment figure as arbitrary, and a reviewing official is more likely to feel free to recompute the penalty. Moreover, these cases may present more frequent disputes about issues of fact, such as whether the fatality or serious injury was caused by the alleged violation or whether a failure to take corrective action was "unwarrantable."

A comparison of the collection ratios reported by the several MSHA district offices tends to reinforce this hypothesis. Table III presents the collection ratios for each of the nine enforcement offices, for regular assessment and special assessment cases. As the table indicates, the dispersion among district collection ratios is much greater for violations assessed by the special assessment method than for those assessed by the regular assessment formula.

TABLE III

MINE SAFETY AND HEALTH ADMINISTRATION

COLLECTION RATIO, BY TYPE OF CASE AND DISTRICT OFFICE, COAL AND NON-COAL MINE PENALTY CASES CLOSED AT CONFERENCE STAGE, CALENDAR YEAR 1978[1]

District Office	Collection Ratio (%)[2]	
	Regular Assessment Cases	Special Assessment Cases
Birmingham	66.0	46.5
Bristol	71.4	47.2
Charleston	72.2	53.7

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[191] *See* Table II *supra*.

District Office	Collection Ratio (%)[2]	
	Regular Assessment Cases	Special Assessment Cases
Dallas	77.4	79.7
Denver	63.5	56.1
Lexington	80.8	44.2
Madison	72.4	90.6
Phoenix	66.2	40.0
Uniontown	89.3	60.6
Arithmetic Mean[3]	73.2	57.6
Range	25.8	50.6
Standard Deviation[4]	8.2	17.0
Coefficient of Variation[5]	11.2	29.6

1. Source: MSHA, R20-Payment Activity Report, from 1/1/78 to 12/31/78.
2. Ratio of amount collected to initial review amount, for cases closed after conference.
3. Unweighted mean of reported observations. The weighted (by caseloads) means are 75% for regular assessment cases and 52% for special assessment cases.
4. Root mean square of the deviations from the arithmetic mean.
5. Standard deviation as a percentage of the arithmetic mean.

VI. CASE STUDY II: UNITED STATES COAST GUARD

A. *Statutory Authority*

The United States Coast Guard administers some 106 statutes authorizing the imposition of civil money penalties. This is by far the largest number of civil money penalty statutes enforced by a single agency or administrative unit. The great majority of these statutes (75) are found in the shipping laws collected in Title 46 of the United States Code,[192] which relate to the operation, equipping and staffing of commercial vessels. The Coast Guard also has authority to enforce a large number of civil money penalty provisions under the customs[193] and navigation[194] laws.

The use of civil money penalties to enforce the shipping, customs and navigation laws of the United States is of ancient origin. Most of the statutes can be traced back to the nineteenth century,[195] many to the eighteenth.[196] The form of these early civil money statutes is simplicity itself. For example:

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[192] Sections 30, 32, 37, 38, 40, 45, 46, 77(a), 83i, 83j, 86i, 88g, 108, 153, 155, 156, 159, 170(17)(A), 203, 216e, 222, 224, 224a, 229b, 235, 246, 265, 267, 276, 277, 321, 322, 323, 324, 355, 362, 369, 390(d), 391a, 398, 402, 436, 452, 457, 461, 481, 492, 497, 526(o) 562, 567, 568, 571, 575, 577, 623, 641, 642, 652, 653, 660–1, 662, 664, 667, 668, 670, 672, 672a, 673, 677, 710, 882, 883–1, 883a, 1484.

[193] 19 U.S.C. §§ 1432, 1439, 1440, 1445, 1453, 1454, 1455, 1584, 1586, 1595a, 1599, 1708 (1976 and Supp. 1978).

[194] 33 U.S.C. §§ 157a, 158, 159, 244, 303, 361, 362, 471, 474, 1005, 1208, 1226, 1321(b)(6), 1321(j), 1322, 1415(a) (1976 and Supp. 1978).

> If the vessel shall not be manned as provided in this section, the owner shall be liable to a penalty of $100, or in case of an insufficient number of licensed officers to a penalty of $500.[197]

A few of the old statutes stipulate that the penalty may be collected in a civil action or an action in libel. A majority (57 per cent) of the statutes specify a fixed money penalty. The only role explicitly conferred upon the agency by the shipping laws is the following:

> The Commandant of the Coast Guard . . . may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture provided for in laws relating to vessels or discontinue any prosecution to recover penalties or relating to forfeitures denounced in such laws, excepting the penalty of imprisonment or of removal from office, upon such terms as he, in his discretion, shall think proper; . . . and the Commandant . . . shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper.[198]

In addition to these penalty provisions of ancient vintage, the Coast Guard has authority to invoke civil money penalties in the enforcement of several recent statutes, such as the Federal Boat Safety Act of 1971,[199] the International Voyage Load Line Act of 1973,[200] the Federal Water Pollution Control Act,[201] and the Ports and Waterways Safety Act of 1972.[202] Most of these provisions reflect a more contemporary statutory model expressly empowering the agency to "assess" a penalty up to a stated statutory maximum, often after giving the alleged violator "notice and an opportunity for hearing," and after considering certain enumerated statutory criteria.

As the statistics in Table IV indicate, the most significant of the Coast Guard's civil penalty programs—both in terms of caseload volume and

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[195] *E.g.*, Act of June 7, 1872, c. 322, 17 Stat. 276, *codified as amended at* 46 U.S.C. § § 201 *et seq.* (1976) (maintenance of log books for vessels); Act of August 2, 1882, c. 374, 22 Stat. 187, *codified as amended at* 46 U.S.C. §§ 151 *et seq.* (1976) (regulation of passenger-carrying vessels).

[196] Act of December 31, 1972, c. 1, 1 Stat. 292, *codified as amended at* 46 U.S.C. § § 11 *et seq.* (1976) (registry and recording of vessels).

[197] Act of February 28, 1871, c. 100, § 14, 16 Stat. 446, *codified as amended* at 46 U.S.C. § 222 (1976).

[198] 46 U.S.C. § 7 (1976).

[199] 46 U.S.C. § 1484 (1976).

[200] 46 U.S.C. §§ 86i, 86g (1976).

[201] 33 U.S.C. §§ 1321, 1322 and 1415 (1976).

[202] 33 U.S.C. § 1226 (1976).

TABLE IV

CIVIL MONEY PENALTY CASES CLOSED BY THE COAST GUARD, BY PROGRAM, CALENDAR YEAR 1977[1]

Enforcement Program	Number of Cases Closed	Penalties Collected	Collection Per Case
1. Water Pollution Control			
a. Unlawful Discharge[2]	3624	$562,295	$155
b. Pollution Prevention and Removal[3]	669	$43,350	$63
2. Dangerous Cargo[4]	1407	$94,695	$67
3. Tank Vessels[5]	454	$35,350	$78
4. Ports and Waterways Safety[6]	370	$8,880	$24
5. Boating Safety[7]	N.A.	N.A.	N.A.
6. Merchant Marine[8]	N.A.	N.A.	N.A.
Totals	6524	$743,570	$114

1. Sources: United States Coast Guard, District Report of Penalty Cases, 1 January-30 June 1977 and 1 July-31 December 1977; and a computer printout on oil spill cases, calendar years 1973-1977.
2. 33 U.S.C. §1321(b) (6) (1976).
3. 33 U.S.C. §1321(j) (2) (1976).
4. 46 U.S.C. §170 (1976) and 49 U.S.C. §1809 (1976).
5. 46 U.S.C. §391a (1976).
6. 33 U.S.C. §1226 (1976).
7. 46 U.S.C. §1484 (1976).
8. Remaining sections of Titles 19, 33 and 46 enumerated in footnotes 192-94.

collections—is the Coast Guard's oil pollution control responsibilities under the Federal Water Pollution Control Act. For this reason, the following profile of the Coast Guard's enforcement program is based almost exclusively on its experience under that statute.[203]

B. *Penalty Imposition Process*

1. *Notice*

The Coast Guard has established a uniform procedure for handling all civil penalty cases arising under its jurisdiction.[204] Many types of violations—especially those relating to vessels—come to the attention of the agency as a result of either complaints or periodic or random inspections by field inspectors. The Coast Guard learns of most discharges of oil or hazardous substances, by contrast, as a result of self-reporting by the spiller, as required by statute.[205] After completing his inspection or investigation, the investigator prepares a violation report, which he forwards to the appropriate Coast Guard District Commander.[206] The "program manager" for the programmatic activity involved initially reviews the violation report to determine whether the evidence summarized on the report appears to support the allegations made and, if so, what sanction is appropriate. In some cases, the program manager may decide to terminate the case with a letter of warning or, at the other extreme, refer the case for criminal prosecution or judicial forfeiture. In most instances, however, the only appropriate and expedient option is to proceed with the assessment of a civil money penalty. Assessment of penalties for oil spills, for instance, is mandatory.

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[203] For a description of the Coast Guard's oil spill enforcement program see Comptroller General of the United States, Coast Guard Response to Oil Spills—Trying to Do Too Much with Too Little (1978).

[204] 33 C.F.R. § 1.07-1, *as amended by* 43 Fed. Reg. 54187 (1978). These amendments elaborate substantially on the surprisingly cryptic earlier regulations (33 F.R. §§ 1.07-2 to 1.07-23 (1977)). The text describes the procedure followed by the Coast Guard prior to the effective date of the 1978 amendments as well as changes made since their promulgation.

Whether the agency proceeds under an express "assessment" authority—as is the case in its most frequently enforced statutes—or under its general authority to "mitigate" court-assessed penalties, the procedure is the same. The program manager refers the case directly to a "hearing officer," a district employee who has been designated by the District Commander to conduct hearings in penalty cases. Each of the twelve Coast Guard districts has at least one hearing officer. In the busy districts the job of hearing officer is considered a full-time responsibility; in the other districts hearing officers may have other responsibilities. Hearing officers need not be lawyers: they are typically recruited from the program offices and given an intensive training prior to assuming their responsibilities. Until 1978, hearing officers were usually attached to program offices in the districts, but the 1978 rules require a strict organizational separation of hearing officers and enforcement activities.[207]

The hearing officer independently scrutinizes the investigative report to determine that all necessary elements of a violation are present. If so, he sends a notice to the alleged offender that is required by Coast Guard regulations to specify "(1) the charges against him; (2) the law or regulation that he is charged with violating; (3) the amount of the maximum penalty that may be assessed; and (4) the procedures for assessing and collecting the civil penalty."[208] In oil spill cases the agency uses a form letter that recites the date on which the spill occurred, the body of water and the name of the vessel or onshore facility allegedly responsible. The letter schedules a hearing at a specified time and place and offers the respondent the choice, in lieu of attending the hearing, of submitting a written reply or of paying a stipulated penalty amount "preliminary determined to be appropriate."[209] This express offer of an opportunity to resolve the case by paying a specified sum has reportedly increased the efficiency and fairness of the penalty imposition process.[210]

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[205] 33 U.S.C. § 1321 (b)(5)(1976). Failure to notify is a criminal offense.

[206] 33 C.F.R. § 1.07-10(b), *as inserted by* 43 Fed. Reg. 54187 (1978).

[207] *See* 33 C.F.R. § 1.07-15(a), *as amended by* 43 Fed. Reg. 54187 (1978).

[208] 33 C.F.R. § 1.07-20(b), *as inserted by* 43 Fed. Reg. 54187 (1978).

2. *Penalty Standards*

In making that "preliminary determination" as well as his final "assessment" in oil spill cases, the hearing officer is supposed to be guided by three factors enumerated in the statute: the appropriateness of the penalty to the size of the business of the owner or operator, the effect on the owner's or operator's ability to continue in business, and the gravity of the violation.[211] Until its expiration in 1978, an unpublished but publicly available "Commandant Instruction" guided the hearing officer's discretion to set penalty amounts within the $5,000 statutory limit. Pending issuance of a new instruction, the agency has not written penalty policy. Although the 1974 Commandant Instruction has expired—and indeed was apparently never considered fully binding—it illustrates some of the difficulties and pitfalls in establishing standards for discretionary penalty amounts.

The expired Commandant Instruction invited the hearing officer, in considering the "gravity" element, to ask himself seven questions, six of which related to the degree of culpability, and one of which asked whether a "minimum amount of oil" was discharged.[212] The implication of the directive seemed to be that "gravity" depended primarily on degree of culpability and not on degree of harm occasioned by the spill (unless the spill was "minimal," in which case a smaller penalty was warranted). A relatively greater emphasis on culpability than harm may be a reasonable response to the statutory scheme. The statute authorizes the President to promulgate pollution prevention and removal regulations[213] and requires the polluter to reimburse the government for any costs incurred by it to remove a spill.[214] Taken in conjunction with these prevention and removal provisions, the penalty for unlawful discharge might rationally be viewed more as a punishment for carelessness or wilfulness than as a measure of resulting harm to the environment. But the Instruction could have articulated the agency's policy with considerably greater clarity, rather than leaving the precise balance to be struck between "guilt" and "harm" to the unfettered discretion of the agency's assessment officers.

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[209] USCG, Commandant Instruction 5922.11B, Appendix B (October 10, 1974).

[210] "Prior to our using this concept, we had people complain that they hired a lawer and spent quite a deal of effort to defend against a violation of a law which provided a substantial maximum penalty only to find out that the Coast Guard was only contemplating a minimal penalty". Letter from Lt. Cmdr. S.J. Delaney, Office of Chief Counsel, U.S.C.G., to Jeffrey Lubbers, Senior Staff Attorney, ACUS, March 12, 1979, at 6.

[211] 33 U.S.C. § 1321(b)(6) (1976). Several other statutes enforced by the Coast Guard contain penalty standards. *E.g.*, 33 U.S.C. § 1322 (1976) ("gravity of violation," "demonstrated good faith"); 33 U.S.C. § 1415 (1976) ("gravity of the violation," "history of prior violations," "demonstrated good faith"); 46 U.S.C. § 1484 (1976) ("appropriateness of the penalty to size of business," "gravity of the violation," "extent of compliance").

[212] USCG, Commandant Instruction 5922.11B at 809 (October 10, 1974).

[213] 33 U.S.C. § 1321 (j) (1976). Violation is subject to a separate civil money penalty of up to $5000.

Two cases recently decided by the Seventh Circuit illustrate the fact that the degree of environmental damage has in fact played a significant role in Coast Guard penalty determinations. In one, the agency fined a tank barge owner $350 for a spill caused when the barge accidently struck a steel piling and sank.[215] In the other, the agency fined an oil pipeline owner $2,000 for a spill caused when a bulldozer operator struck the pipeline.[216] The pipeline owner seemed, if anything, less culpable than the barge owner. The principal difference between the two cases seemed to be that the amount of oil spilled in the latter case was 20,000 gallons and in the former case only 1,600 gallons.

The Commandant Instruction treated "size of business" and "ability to continue in business" as essentially the same thing.[217] the only substantive guidance offered by the Instruction was that assessors respect an asserted Congressional intent that "companies not normally be forced out of business or seriously impaired in remaining in business by the size of the civil penalty."[218] One might interpret the separate enumeration of "size" and "ability to pay" factors as suggesting a Congressional intent that the "size" factor serve a function distinct from that served by the "ability to pay" factor. Inclusion of the "size" factor might reflect a veiw that larger operation presents society with a larger exposure to oil pollution.[219] That possible interpretation was not recognized in the agency's guidelines.

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[211] 33 U.S.C. § 1321(b)(6) (1976). Several other statutes enforced by the Coast Guard contain penalty standards. *E.g.*, 33 U.S.C. § 1322 (1976) ("gravity of violation," "demonstrated good faith"); 33 U.S.C. § 1415 (1976) ("gravity of the violation," "history of prior violations," "demonstrated good faith"); 46 U.S.C. § 1484 (1976) ("appropriateness of the penalty to size of business," "gravity of the violation," "extent of compliance").

[212] USCG, Commandant Instruction 5922.11B at 809 (October 10, 1974).

[213] 33 U.S.C. § 1321 (j) (1976). Violation is subject to a separate civil money penalty of up to $5000.

[214] 33 U.S.C. § 1321(f) (1976).

[215] United States v. Textow, Inc., F.2d (7th Cir. 1978) No. 78-1656).

[216] United States v. Monathon Pipe Line Company, F.2d (7th Cir. 1978) (No. 78-1453).

[217] USCG, Commandant Instruction 5922.11B at 9 (October 10, 1974).

[218] *Id.*

[219] MSHA has adopted a comparable interpretation of the "size" criterion used in the Mine Safety and Health Act. *See* p. 226-27 and note 132 *supra*.

Interestingly, the Instruction directed the hearing officer to take size of business into account *before* calculating even the "preliminary" assessment figure. "This is normally possible," the Instruction recited, "because the businesses are generally known to the Hearing Officer or its staff or information on its size may be discovered by a call to the appropriate Captain of the Port or district finance personnel."[220] Since the Coast Guard does not routinely regulate potential polluters' businesses or collect certified financial reports from them, such information would often have been highly impressionistic. Because the notice expressly invited the respondent to furnish information on the financial impact of the penalty, overestimates of ability to pay could presumably be corrected. Underestimates of ability to pay—reflected in a low "preliminary" assessment—would, however, presumably go uncorrected since the respondent would have no interest in raising the issue.

3. *Hearing*

The respondent has 30 days after receipt of the notice to request a hearing or submit a written response.[221] The procedures followed in civil penalty "hearings" have only very recently been specified in the agency's published regulations.[222] The new regulations move the agency's penalty assessment process firmly in the direction of a trial-type hearing, but stop short of that model in several respects. The alleged violator is permitted to appear in person or by counsel and to introduce witnesses or documentary evidence.[223] The Hearing Officer takes notes on oral testimony, but ordinarily makes no verbatim record unless the alleged violator brings in a transcriber at his own expense.[224] The Coast Guard normally is not represented by counsel nor does it introduce witnesses.[225] Hearing Oficers must make copies of the investigative file available before the hearing at the respondent's request.[226] If the truncated trial procedures mandated by the Coast Guard's rules do not provide for adequate ventilation of disputed factual issues, the Hearing Officer is free to supplement these procedures. He may, for example, require a transcript or offer a respondent an opportunity to confront and cross-examine agency witnesses.

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[220] USCG, Commandant Instruction 5922.11B at 9 (October 10, 1974). Hearing officers no longer attempt to anticipate "size of business" mitigation claims.

[221] 33 C.F.R. § 1.07-25(a), *as inserted by* 43 Fed. Reg. 54187 (1978). The 1978 amendment lengthened the response period from 15 to 30 days and required the applicant to "specify the issues which are in dispute," exclusing from consideration at the hearing any "nonjurisdictional" issue not raised at least 10 days prior to the hearing.

[222] *See* 43 Fed. Reg. 54186–89 (1978).

[223] 33 C.F.R. § 1.07-50, *as inserted by* 43 Fed. Reg. 54188 (1978).

[224] 33 C.F.R. § 1.07-60, *as inserted by* 43 Fed. Reg. 54188 (1978).

[225] The agency's case is presented by the introduction of the case file. The new regulations permit the Coast Guard to introduce "rebuttal evidence" after the petitioner has presented his case. 33 C.F.R. § 1.07-55(c), *as inserted by* 43 Fed. Reg. 54188 (1978).

[226] 33 C.F.R. § 1.07-30, *as inserted by* 43 Fed. Reg. 54187 (1978).

The Coast Guard has taken the position that his hearing process satisfies the requirement for "notice and an opportunty for a hearing" found in several of its statutes.[227] To the extent that such a fact-finding procedure might, in any instance, fail to meet constitutional due process standards, the Coast Guard argues that de novo review is available at the judicial level.[228] This position has apparently been accepted by at least one federal district court,[229] but rejected by at least one other.[230] The Coast Guard resists interpreting "hearing," as used in the statutes, to require an "on the record" hearing under Section 5 of the APA for at least three reasons. First, it wishes to avoid using administrative law judges as hearing officers. ALJ positions are reportedly difficult to obtain from the Civil Service Commission and the Office of Management and Budget [231] and there appears to be some sentiment in the agency that existing hearing officers are more productive, expert and flexible than ALJs.[232] Second, the Coast Guard resists affording respondents an opportunity to confront and cross-examine witnesses in all cases, since this would often needlessly extend the length of hearings and consume valuable staff-hours of investigative personnel. Finally, the Coast Guard argues that since it lacks a general subpoena power, formal agency hearings could not always satisfy due process anyway.[233]

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[227] *See* 43 Fed. Reg. 54186 (1978) (arguing that section 5 of the APA is inapplicable since the statute does not require a hearing "on the record."). This issue is discussed at pp. 321–24 *infra.*

[228] Letter from G.H. Patrick Bursley, Chief Counsel, United States Coast Guard, to Robert A. Anthony, Chairman, Administrative Conference of the United States, Attachment at 4, December 23, 1976.

[229] The court in United States v. General Motors Corporation, 403 F. Supp. 1151 (D. Conn. 1975), accepted the parties' stipulation that the proper proceeding in the district court was a trial de novo. Several other district courts have accorded a very limited standard of judicial review of the *penalty amount. E.g.,* United States v. Beatty, 401 F. Supp. 1040 (W.D. Ky. 1975); United States v. W.B. Enterprises, 378 F. Supp. 420 (S.D.N.Y. 1974). But this does not necessarily mean that these courts would not require a de novo trial of disputed issues concerning *liability.* See the authorities cited note 525 *infra.*

[230] United States v. Independent Bulk Transport, 394 F. Supp. 1319 (S.D.N.Y. 1975). *Cf.* United States v. Cheramie Bo-Truc #5, 538 F.2d 696 (5th Cir. 1976).

[231] The Coast Guard already has a corps of 15 ALJs. *See* Comptroller General of the United States, *supra* note 182 at 49. Since the Coast Guard's ALJ positions are rated at GS-15, it is not subject to the government-wide supergrade quota applicable to GS-16 ALJs. Nonetheless, additional positions must be authorized by the Civil Service Commission and funded by OMB. On the CSC's role, see *Id.* at 38–43.

[232] The GAO has noted wide variations in the productivity of ALJs in other agencies. Comptroller General of the United States, *supra* note 182 at 31–33.

[233] *See* 43 Fed. Reg. 54186 (1978). But Congress has often authorized formal hearing procedures without simultaneously conferring subpoena authority. *See* 1 K. Davis, Administrative Law Treatise § 8.15 (1970 Supp.).

4. *Administrative Appeal*

After the hearing or receipt of a writen submission, the hearing officer prepares an "assessment" notice which formally assesses a monetary penalty. The assessment letter must include "the specific findings made by the hearing officer, the amount of the penalty assessed, and the time and procedure for paying the civil penalty."[234] The respondent then had 30 days to file an appeal with the Commandant.[235] At one time the District Commander had authority to "comprimise" and appealed penalty claim,[236] but current regulations authorize the District Commander only to "comment" upon the appeal before its transmision to the Commandant.[237] Appeals to the Commandant are reviewed by the appropriate division within the agency's Office of Chief Counsel. The Chief Counsel has authority to decide most appeals.[238] Although the Commandant has authority to modify penalty amounts which he finds to be excessive,[239] the usual practice is to remand such cases to the districts for further consideration. In calendar year 1976 there were 669 appeals to the Commandant. The Commandant affirmed the Hearing Officer's decision in 96.5 per cent of these cases. More recently, however, the affirmance rate has dropped to a figure nearer 80 per cent, due to changes in procedure requiring more rigorous documentation of decisions.

If the respondent still refuses to pay the penalty after administrative review (or abandons his administrative remedies at any earlier stage), the case is referred to the appropriate United States Attorney for collection.

Funds collected from civil penalties imposed for unlawful discharge of oil are deposited in a special revolving fund.[240] Monies in the revolving fund may be expended, without appropriation, for removal of spills and administration of the Act. Monies collected by the Coast Guard in criminal fines and civil recovery for removal costs are also credited to the fund, but the three sources have proved inadequate to maintain the fund at an acceptable level, with the consequence that repeated appropriations have been required to replenish it.

C. *Enforcement Data*

The Coast Guard established a computer-based information system to record data on its enforcement activities.[241] Although the system has only limited capacity to generate management information reports on enforcement actions, it is largely operational as an information storage and retrieval system, particularly with respect to oil spill cases. The Coast Guard was able to provide a printout displaying significant information about every oil spill identified by the Coast Guard during the years 1973 through 1977 and the resulting action taken. Although reporting levels reportedly vary widely among Coast Guard districts,[242] the data provides a basis for drawing at least some conclusions about the agency's enforcement procedures. Since the 1977 data was less complete at the time of writing, 1976 data were used. The vast majority of reported cases were brought under authority of section 311(b) (6) of the Federal Water Pollution Control Act, which forbids discharge of oil or other hazardous substances into navigable waters of the United States without a permit.[243] In order to control for variations in statutory authority, only section 311(b) (6) cases were examined. Table V summarizes the data.

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[234] USCG, Commandant Instruction 5922.11B at 10 (October 10, 1974). The 1978 regulations stipulate that an assessment order must be "based upon substantial evidence in the record." 33 C.F.R. § 1.07-65(a), *as inserted by* 43 Fed. Reg. 54188 (1978).

[235] 33 C.F.R. §§ 1.07-70 and 75, *as inserted by* 43 Fed. Reg. 54188 (1978).

[236] USCG, Commandant Instruction 5922.11B at 10 (October 10, 1974). The Instruction forbade the District Commander to solicit compromise offers or to give "the appearance of bargaining for the penalty amount."

[237] 33 C.F.R. § 1.07-75(a), *as inserted by* 43 Fed. Reg. 54188 (1978).

[238] *See* 33 C.F.R. §25.1609(a) (1977) (claims not exceeding $10,000).

[239] *See* 33 C.F.R. § 1.07-75(b), *as inserted by* 43 Fed. Reg. 54188-89 (1978).

[240] 33 U.S.C. § 1321(k) (Supp. 1977).

1. Agency-wide Performance

The data furnished by the Coast Guard did not provide a basis for calculating the number of cases in which the penalty proposed by the hearing officer was paid in full without protest. Hearings were in fact held in some 29 percent of vintage-1976 cases reported as closed. There is presumably some additional number of cases in which respondents simply refused to respond to the penalty notice. The relatively high percentage (11) of 1976 cases still open[244] in March 1978 suggests that this number may be more than negligible. It therefore seems likely that the percentage of cases in which the recipient of a penalty notice pays without protest is between 65 and 70.

The prospects of obtaining relief from a district hearing officer appeared to be quite good. Hearing officers reduced or cancelled penalty assessments in over two-thirds of the cases in which an informal hearing was held. The average amount initially assessed was $547 per case. In cases in which a hearing was held, by contrast, the average amount assessed was $1,054.[245] Cases in which the hearing officer granted mitigation carried a higher average initial assessment ($1,252) than those in which the hearing

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[241] The system is described in USCG, Pollution Incident Reporting System, Coding Instruction Manual CG-450 (1976).

[242] *See* note 244 *infra.*

[243] 33 U.S.C. § 1321(b)(6) (1976).

[244] "Open" in this context means that the computer print-out for the case shows no entry (including "0") in the "amount collected" column. From the data it is difficult to know with assurance what stage "open" cases had reached.

[245] Based on a random sample of the cases reported on Table V, *supra.*

TABLE V

United States Coast Guard Civil Penalty Cases Under FWPCA §311(b)(6),[1] by District, Calendar Year 1976[2]

	Coast Guard Districts[3]												Coast Guard Total
	1	2	3	5	7	8	9	11	12	13	14	17	
Total Cases Closed	158	729	231	202	166	824	298	130	108	301	56	92	3295
AverageProposed Penalty[4] ($)	662	502	1058	419	377	605	366	539	576	474	370	384	547
Average Amount Collected ($)	423	472	439	253	374	422	176	384	561	249	351	364	384
Collection Rate[5]	63.9	94.0	41.5	60.4	99.2	69.8	48.1	71.2	97.4	52.5	94.9	94.1	70.2
Mitigation Cases: Number[6]	95	122	185	82	4	193	84	15	2	96	2	4	885
Percent of Closed Cases	60.1	16.7	80.1	40.6	2.4	23.4	28.2	11.5	1.9	31.9	3.6	4.3	26.9
Hearings: Number[7]	120	169	210	124	5	115	24	22	56	99	3	7	954
Percentage[8]	76.2	23.2	90.9	61.6	3.0	13.9	8.1	16.9	52.3	33.0	5.4	7.4	29.0
Mitigation Rate[9]	71.0	16.1	98.6	77.7	22.2	92.4	93.1	66.7	5.3	100.0	66.7	71.4	68.9

1. 33 U.S.C. §1321(b) (1975) (discharge of oil or other hazardous substance without permit).
2. Source printout of selected data on oil spill cases initiated during calendar years 1973-1977. United States Coast Guard, March 1978.
3. Due to consolidation, the district numbers are not consecutive.
4. "Preliminarily determined" penalty amount as shown on original notice to alleged violator.
5. Average amount collected as a percentage of average penalty proposed.
6. Cases in which proposed penalty was reduced.
7. Hearing conducted by district hearing officer.
8. Percentage of closed cases in which a hearing was held.
9. Percentage of hearing cases in which proposed penalty was cancelled or reduced.

officer refused to mitigate ($719). These data, then, reinforce a conclusion drawn from the mine safety case study that propensity to seek mitigation of penalty assessments is a direct function of the amount assessed.[246] The data also reveal that the ability to challenge a penalty assessment *successfully* is a function of the amount at stake.

Conclusions about efficiency are difficult to draw because the system does not display the dates of any actions other than the initiation of the penalty case. Of the actions initiated during the months of October through December 1977, 80 per cent had been reported as closed by the time the printout was prepared (March 1978). Given observed variations in the reporting rate, this suggests that the procedure works quite efficiently.

Table VI provides data on 885 cases in which the original assessment was cancelled or reduced. In 846 of those cases, the penalty was mitigated by a hearing officer, usually (in 708 cases) after hearing, but in a significant number (138) of cases, on the basis of a written submission. By comparison, mitigation was granted on appeal in only a handful of cases. As expected, the median reduction was greater for cases in which relief was granted on appeal (67 per cent) than cases in which relief was granted by the hearing officer only (50 per cent).[247]

Only very rarely did the Coast Guard refer a penalty case to the United States Attorney (one per cent of reported cases). Of 1976 spill cases so referred, about two-thirds had been closed by March of 1978, half of them without the necessity for initiating prosecution. Since referral dates are not shown, it is impossible to draw any conclusion about prosecutorial speed from the data.

2. *Interdistrict Variations*

Table V contains some revealing insights into the variations in performance among Coast Guard districts. Some of the observed variation is undoubtedly attributable to variations in the completeness of reporting by the district offices.[248] Yet, even allowing for this effect, the principal indicators still display a pronounced dispersion. The most striking variation occurs in the data on the number of hearings conducted. The number of hearings held, as a percentage of penalty cases, ranges from a low of 3 per

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[246] *See* pp. 240–41 *supra*.

[247] This finding echoes a similar finding in the mine safety case study. *See* text p. 237 *supra*.

[248] Case monitors in the district offices and at headquarters are supposed to enter an appropriate code in the automated information system at each possible stage in the procedure, even if no action was sought or taken at that stage. If the spaces provided for tracking the progress of cases initiated more than a few months prior to the print-out show a large number of blanks, this would seem to indicate a low level of reporting. On this basis, it appeared that districts 7 and 17 underreported data on hearings, districts 3, 5 and 7 underreported data on appeals, and districts 2, 5 and 14 underreported data on proposed penalties.

TABLE VI

FWPCA §311(b)(6) CIVIL MONEY PENALTY CASES IN WHICH PROPOSED PENALTY WAS MITIGATED BY COAST GUARD, CALENDAR YEAR 1976[1]

Stage at Which Mitigation Was Granted	Number of Cases[2]
Hearing Officer	846
Without hearing	138
After hearing	708
District Commander	49
Commandant	3
Total mitigation cases	885

1. Source: printout of selected data on oil spill cases initiated during calendar years 1973-1977, United States Coast Guard, March 1978.

2. Numbers total more than 885 because mitigation was granted at two or more stages in some cases.

cent (or 5 per cent, if District 7 is disregarded) to a high of 91 per cent. For some reason, then, the demand by penalty notice recipients for an informal hearing varies enormously by district. A comparable variation is revealed by data on the rate of mitigation. In some districts (2, 7 and 12), hearing officers rarely cancel or reduce a proposed penalty after hearing; while in others (3, 8, 9 and 13), hearing officers almost always grant mitigation.

Less dramatic, but nonetheless large, dispersions are apparent in the average amounts assessed and collected. Disregarding the somewhat aberrant and possibly unreliable data from District 3, the data indicate a modest range in average proposed penalty amounts per spill (from a low of $366 to a high of $662). An even wider variation is apparent in average collection figures (from a low of $176 to a high of $561) and in average collection rates (48 percent to 99 per cent).[249] The percentage of cases in which at least some penalty reduction was granted shows a huge interdistrict variation (from two per cent to 80 per cent).

It is, of course, dangerous to read too much into data like these without having a profile of oil spill cases for each district. Obviously, spills vary widely by type, size, source, and consequence. Yet, the extremely wide variations in hearing frequency, mitigation rate, and collection percentage cannot be explained adequately by regional differences in case profile. These variations, in particular, tend to confirm one's expectation that the largely open-end regulatory standards produce widely divergent results in practice. In particular, the conclusion is inescapable that the agency's district hearing officers vary considerably in their application of assessment and mitigation criteria.

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[249] By way of comparison with the dispersion in collection ratios reported by MSHA district offices (Table III), the standard deviation for USCG districts was 21.2 and the coefficient of variation 28.6%.

VII. CASE STUDY III: FEDERAL COMMUNICATIONS COMMISSION

The Federal Communications Act contains some 14 statutory civil money penalty provisions administered by the Federal Communications Commission.[250] Most of these provisions have remained substantially unchanged since the Act was passed in 1934. They used the term "forfeiture" once commonly used to refer to a civil money fine, but now largely restricted to the seizure of tangible property other than money. Following the "old" statutory model, most of the statues provide for fixed penalties recoverable in a civil action[251] (or in the case of ship forfeitures, by way of libel)[252] in federal district court, but subject to "remission or mitigation" by the FCC.[253] One penalty provision—Section 503—adds a requirement that the agency must first issue a "notice of apparent liability" to the alleged violator and give the violator an opportunity to respond in writing or, in a limited class of cases, in person, and gives the FCC an option to utilize an administrative-imposition procedure in lieu of civil suite.[254]

The FCC has delegated principal enforcement responsibilities to its three functional bureaus, the Broadcast Bureau, the Common Carrier Bureau, and the Safety and Special Radio Services Bureau. The Commission's investigative unit, the Field Operations Bureau, provides investigative support to all three bureaus and has authority to issue initial assessments in a very limited category of cases.[255] The Common Carrier Bureau administers statutory forfeiture provisions relating to unlawful acts of regulated common carriers, such as charging of unauthorized rates,[256] extension of lines without a certificate,[257] and failure to file required reports[258] and keep proper accounts.[259] The Bureau very rarely invokes these provisions. During the year 1974 through 1977, the Bureau assessed forfeitures in an average of only 2.5 cases per year. The average assessment per case was about $3,250 and the average collection per case was about $1,300. Consequently, this case study focuses on the forefeiture activities of the Commission's other two programmatic bureaus.

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[250] 47 U.S.C. §§ 202(c), 203(e), 214(d), 219(b), 220(d), 362(a), 362(b), 386(a), 386(b), 503(a), 503(b), 503(b)(3)(A), 507(a), 507(b) (1976 and Supp. 1978).

[251] *E.g.*, 47 U.S.C. § 202(c) (1976) (unjust discrimination by common carrier).

[252] *E.g.*, 47 U.S.C. § 386(a) (1976) (navigation of vessel without required radio transmission equipment).

[253] *See* 47 U.S.C. § 504(b) (Supp. 1978).

[254] 47 U.S.C. § 503(b) (Supp. 1978).

[255] *See generally* Comptroller General of the United States, The Role of Field Operations in the Federal Communication Commission's Regulatory Structure (1978) [hereinafter cited as GAO FOB Report].

[256] 47 U.S.C. § 203(e) (1976).

[257] 47 U.S.C. § 214(d) (1976).

[258] 47 U.S.C. § 219(b) (1976).

[259] 47 U.S.C. § 220(d) (1976).

A. Broadcast Bureau

1. Statutory Authority

The Broadcast Bureau is responsible for licensure and regulation of the FCC's broadcast licensees. Its civil forfeiture authority derives from Section 503(b) of the Act. Until 1978, Section 503(b) addressed broadcast licensees and permittees exclusively. It authorized a forfeiture of up to $1,000 per day of violation, up to a maximum of $10,000 per episode, for willful or repeated failure to comply with any applicable provision of the statute, FCC regulations, a cease and desist order, or the terms of a license or permit. Before instituting an enforcement suite, the Commission was required to issue a "notice of apparent liability" and give the licensee an opportunity to respond in writing. The 1978 amendment[260] broadened the scope of Section 503(b) by incorporating into it a comparable provision—Section 510[261]—relating to non-broadcast radio licensees and raised the upper limit on forfeitures to $2,000 per day and $20,000 per episode.[262] The amendment also for the first time authorized the imposition of a forfeiture against a non-licensee who violates any provision of the act or regulations.[263] The upper limit per episode for non-licensees is $5,000. The amendment also adds a list of factors that the Commission must consider in determining the precise amount at which to assess a penalty.[264]

The statute carries forward the minimal procedural requirement of a notice and opportunity to reply in writing, as prerequisite to instituting an enforcement suite.[265] The Commission may, however, elect to utilize an alternative procedure involving an administrative hearing under Section 5 of the APA, followed by limited judicial review or summary collection action.[266] The choice between these two procedural options is "at the discretion" of the FCC.

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[260] Pub. L. 95-234, § 4, 92 Stat. 35 (1978).

[261] 47 U.S.C. § 510, *repealed by* Pub. L. 95-234, § 4, 92 Stat. 35 (1978).

[262] 47 U.S.C. § 503(b) (2) (Supp. 1978).

[263] 47 U.S.C. § 503(b)(5) (Supp. 1978). Unless the offense charged is unlicensed operation, the FCC must first provide the nonlicensee a warning before it may impose a penalty.

[264] 47 U.S.C. § 503(b)(2) (Supp. 1978) ("the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require").

[265] 47 U.S.C. § 503(b)(2) (Supp. 1978).

[266] 47 U.S.C. § 503(b)(3) (Supp. 1978).

2. *Violation Notice*

The Broadcast Bureau (BB) supervises the activities of some 9,000 broadcast licensees. They vary in size, profitability, and sophistication from tiny independent rural radio stations to network-affiliated television stations serving the top 50 markets. Numerically, the vast majority of licensees fall into the former category. Broadcast licensees are subject to a wide range of operating regulations, relating to equipment, power output, time of operations, assigned frequency, record-keeping, and content of broadcasts.[267] Typical broadcast violations include operating at an unauthorized hour of day,[268] failure to keep accurate records of equipment checks,[269] failure to identify commercial sponsors,[270] advertising lotteries,[271] or failure to provide equal opportunity to respond to personal attacks or political endorsements.[272]

At one time most violations were discovered by field inspectors in the course of regular periodic station inspections. But staff limitations in the Field Operations Bureau (FOB) and expanding non-broadcast responsibilities—especially citizen's band[273]—have forced the curtailment of cycle inspections.[274] As a result, most broadcast-related violations are now detected as a result of special inspections conducted either at the request of the BB's Renewal Branch, or in response to a complaint. If an inspector concludes that a violation has occurred, he issues a "notice of violation" to the licensee that describes the evidence of violation and specifies the statute or regulation violated. The notice informs the respondent that violations, "if repeated or willfull, . . . may result in the imposition of monetary forfeitures," and invites the respondent to reply in writing to the appropriate field office.[275] The notice does not "assess" a penalty nor even specify what the statutory maximum amount is.

The field office immediately forwards a copy of the violation notice to FOB headquarters in Washington, which reviews it for accuracy completeness, adequacy of asserted evidence, and consistency with enforcement policy. If the notice is defective, the field office may be directed either to reconsider or to cancel the notice. Later, after allowing a reasonable period for written reply from the respondent,[276] the field office sends a copy of the complete file to FOB headquarters with a cover memorandum recommending disposition. If the field office concludes that the offense was neither willful nor repeated and if the respondent has taken corrective action, the field office recommends that no sanction be imposed. Otherwise, the field office will recommend the imposition of a sanction, usually a forfeiture, occasionally, in the case of particularly egregious violations, license suspension or revocation or criminal penalties. FOB headquarters, in turn, reviews the file and forward it to the Broadcast Bureau with its own recommendation.

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[267] *See generally* 47 C.F.R. § 0.281 (1977).

[268] 47 C.F.R. § 73.73 (1977).

[269] 47 C.F.R. § 73.114 (1977).

[270] 47 C.F.R. § 73.1212 (1977).

[271] 47 C.F.R. § 73.1211 (1977).

[272] 47 C.F.R. § 73.123 (1977).

[273] *See* p. 71 *infra*.

[274] The FOB ranks cycle inspection of braodcast stations in category 3, out of 4 priority categories. GAO FOB Report, *supra* note 255 at 49.

[275] FCC, Official Notice of Violation, FCC Form 793, April 1975. *See* 47 C.F.R. § 1.89(a) (1977).

3. Notice of Apparent Liability

At the BB, a staff attorney reviews the file, checks on the financial condition of the respondent as indicated by its most recent annual financial report on file at the FCC, and prepares a recommendation to the Chief of the BB. The financial data reported in a typical memorandum includes gross revenues, depreciation, payments to principals, and net earnings (loss). The precise relevance of and weight to be given to these various indicators is not expressed. A review of selected case files suggests that the policy is to disregard a net loss if either the depreciation figure exceeds the loss or the amount of payments to principals is substantial. With regard to the precise amount to be assessed, a typical justification read:

> Forfeitures for this type of violation normally range from $500 to $2000. The staff believes that $2000 is appropriate since the violations are of long duration and the daily duration averages one hour with full day-time power prior to sunrise.

If a decision is made to impose a monetary forfeiture, the next step is the issuance of a "notice of apparenty liability."[277] The FCC has delegated to the Chief of the BB authority to issue notices of apparent liability for forfeitures up to a stated dollar amount. The dollar limit at the time research for this study was undertaken was $2000.[278] Recently the Commission has raised the limit to $4000 to reflect the increase in the maximum forfeiture authorized by the 1978 statutory amendment.[279] Assessment of a larger amount must be issued by the full Commission. Securing Commission approval for issuing a forfeiture notice delays the process by about one month. The BB rarely suggests a forfeiture in excess of its delegated limit, except in cases of extremely flagrant or serious violations. In most of these cases, the BB routinely recommends a large forfeiture as an alternative to license suspension or revocation. A review of the 205 forfeiture notices issued to broadcast licensees during the period September 24, 1976, through June 12, 1978, indicated only 16 notices issued by the Commission. Twelve of these were issued in conjunction with notices for hearing on possible licenses suspension or revocation, and only four were "pure-forfeiture" cases involving amounts between the then-applicable $2000 delegation limit and $10,000 statutory limit. Thus, in only about two percent of the simple forfeiture cases does the BB propose penalties that exceed its delegated limit. By contrast, over ten percent of the forfeitures were assessed at the $2000 limit. The effect of the delegation limit, then, seems quite clearly to constrict the range within which the agency actually operates. While this does not necessarily affect the level at which relatively minor offenses are assessed, it may well compress the assessments imposed for more serious violations into an excessively narrow band. The doubling of the delegation limit in response to the doubling of statutory limits should relieve this compression.

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[276] 47 C.F.R. § 1.89 (1977).

[277] *See* 47 U.S.C. § 803(b)(2) (Supp. 1978); 47 C.F.R. § 1.80(f), *as amended by* 43 Fed. Reg. 49309 (1978).

[278] 47 C.F.R. § 0.281 (1977).

[279] *See* 44 Fed. Reg. 5436 (1979).

4. *Mitigation Request*

The notice of apparent liability takes the form of a letter that in addition to describing the alleged offense and citing the rule, specifies an exact forfeiture amount.[280] The notice gives the respondent three choices: to pay the amount in full; to submit a detailed statement "as to why . . . the forfeiture should be cancelled or reduced;"[281] or to take no action (in which case, an order of forfeiture would issue).[282] The letter does not specify criteria that the agency might consider in deciding whether to cancel or reduce a penalty. The respondent is not offered an opportunity to discuss the case in person or by telephone. According to BB officials, an unsolicited request for a personal interview is never denied, but respondents are advised that only what they put in writing will be considered in the final decision. The justification for this position is that, unlike an oral communication, a written communication helps to provide a basis for any subsequent administrative review or external audit of the decision.

After considering the written response, if any, to the forfeiture notice, the BB prepares a "Memorandum Opinion and Order" (usually called a "forfeiture order") issued in the name of the Commission by the chief of the bureau. While forfeiture orders examined in the course of this study contain detailed discussions of the facts and issues raised by respondents, they provide relatively little explanation of why the precise penalty amount was chosen. Licensees dissatisfied with the forfeiture order may request a reconsideration of the order by the issuing authority (usually the Chief of the BB). Finally, there is an opportunity to appeal to the full Commission for review of the order, and, if the Commission sustains the order, for reconsideration.[283] If the respondent still refuses to pay the forfeiture after exhausting his administrative remedies, the Commission refers the case to the Justice Department for enforcement action in federal district court.

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[280] 47 C.F.R. § 1.80(f)(1), *as amended by* 43 Fed. Reg. 49309 (1978).

[281] FCC Form 5003-A, March 1976.

[282] 47 C.F.R. § 1,80(f)(4), *as amended by* 43 Fed. Reg. 49309 (1978).

5. *Optional Administrative Imposition Process*

The 1978 amendment authorizes the Commission, "at its discretion," to follow an alternative procedure for assessing a forfeiture. The alternative procedure is to provide the respondent with "notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of title 5" (APA section 5).[284] This, in effect, is the procedure used presently in license suspension and revocation cases.[285] That is, once the BB determines that an offense is so serious as to warrant license action, it places the recommendation on the Commission's docket. If the Commission concurs, the notice is issued and the hearing scheduled before an ALJ. The same procedure will be followed in forfeiture cases conducted under the alternate procedure. The Commission has recently announced its policy on the use of the alternate procedure. According to its implementing rules, the optional procedure:

> will ordinarily be followed only when a hearing is being held for some reason other than the assessment of a forfeiture (such as, to determine whether a renewal application should be granted) and a forfeiture is to be considered as an alternative or in addition to any other Commission action.[286]

In the Commission's view, then, the 1978 amendment enables it to continue its practice of using the monetary fine as a supporting sanction for serious misconduct, but with the great advantage that a penalty order issued after hearing will no longer require a de novo judicial trial for enforcement.[287]

One might question wisdom of thus restricting the "administrative imposition" option. As the Administrative Conference concluded in its 1972 report,[288] a system of judicial penalty imposition may entail greater costs to the agency, the violator and society than a system of administrative imposition, particularly in cases involving relatively small penalties. The efficiency of the agency's existing informal assessment process need not be sacrificed: that process could continue to be used as an antecedent to a formal agency adjudication. It may be argued that the issue is not important in any event, since few "simple forfeiture" cases are ever litigated in any event.[289] But this is not necessarily a fair measure of the cases that would be litigated if a more expeditious and economical forum were available. Nor does it accurately measure the total cost of the present system, since some forfeitures simply go uncollected for lack of an expeditious enforcement process. For example, of the 100 forfeiture cases intitiated in calendar 1977, 23 remained open as of July 20, 1978. Eight of these (representing a maximum possible liability of $80,000) were combined license revocation-forfeiture cases presumably awaiting hearing or administrative review, but 15 (representing total claims of $13,650) were simple forfeiture cases, most of which had not progressed beyond the first or second stage of the process.

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[283] 47 C.F.R. § 1.80(i), *as amended by* 43 Fed. Reg. 49309 (1978); 47 C.F.R. § 1.106 (1977).

[284] 47 U.S.C. § 503(b)(3)(A) (Supp. 1978).

[285] 47 U.S.C. § 312 (1976); 47 C.F.R. §§ 1.85 and 1.91 (1977).

[286] 47 C.F.R. § 1.08(g), *as amended by* 43 Fed Reg. 49309 (1978).

[287] The accused may obtain review of such an order in a court of appeals under 47 U.S.C. § 402(a) (1976). In a collection action, the validity of an unappealed order "shall not be subject to review." 47 U.S.C. § 503(b)(3)(B) Supp. 1978).

[288] *See* note 6 *supra*.

6. *Enforcement Data*

Table VII summarizes the forfeiture cases initiated between September 24, 1976, and June 12, 1978. The data shows that a high percentage of closed cases (70 percent) is resolved by direct payment on the notice of apparent liability. In these cases payment was received an average of 33 days after the date on which the notice was issued. An additional 26 percent of cases was closed after one exchange of correspondence (submission of a written reply followed by issuance of a forfeiture order). The remaining reported closed cases were closed after one additional step—a petition for reconsideration. These last two steps, however, add considerably to the processing time. Cases settled after the forfeiture order took, on average, 179 days to close, over five times as long as the direct payment cases, and cases closed after a reconsideration request consumed an average 301 days. A review of all cases (open and closed) shows that by far the largest source of delay is the preparation and issuance of a forfeiture order. In cases in which mitigation was requested (60), the average delay between the notice of apparent liability and the mitigation request was only 31 days, while the delay between request and forfeiture order was 113 days. In cases in which respondents ignored the notice of apparent liability (neither paid nor requested mitigation), it took the BB 122 days, on average, to issues a forfeiture order. This is particularly suggestive evidence that the principal source of delay is simple administrative backlog.[290]

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[289] Litigation is quite rare. The United States instituted 19 forfeiture actions during the years 1976 through 1978: seven went to trial.

[290] During the period in question the BB had three attorneys working approximately half-time on forfeiture cases. This would help explain the average 113 day period consumed in issuing forfeiture orders in contested cases, but would not adequately explain the 122-day period consumed in issuing forfeiture orders in uncontested cases.

TABLE VII

MONETARY FORFEITURE NOTICES ISSUED TO BROADCAST LICENSEES BY THE FEDERAL COMMUNICATIONS COMMISSION, SEPTEMBER 24, 1976-JUNE 12, 1978[1]

	Number of Cases	Average Initial Assessment ($)	Average Collection ($)	Average Time Elapsed (Days)
All Cases[2]	193	813	–	–
Closed Cases	148	728	693	83
Paid After:				
(1) NAL[3]	103	759	759	33
(2) Forfeiture Order	38	618	503	179
(3) Mitigation Action[4]	7	857	764	301
Mitigation Cases				
Mitigation Requested	45	656	543	198
Mitigation Granted	11	577	118	186

1. Source: Log sheets of civil forfeiture cases maintained by the Broadcast Bureau, Federal Communications Commission, as of July 20, 1978.
2. "Simple forfeiture" cases only. Twelve cases in which forfeiture was proposed as an alternative to license suspension or revocation are not included.
3. Notice of apparent liability.
4. Request for reconsideration of forfeiture order.

The 45 cases in which mitigation was requested did not involve, on average, any higher forfeiture claims than cases closed by direct payment. This evidence is not necessarily inconsistent with conclusions drawn earlier from the mine safety and oil spill programs that, at moderate penalty levels (several hundreds of dollars), the propensity to request mitigation is a direct function of the dollar amount.[291] The first mitigation step in those cases involved a right to an oral hearing, whereas here the first step (indeed, all administrative stages) consists only of the submission of a written request. It is relatively costless to write a simple letter of protest. The taking of any further procedural steps, however, may present the respondent with a more discouraging cost-benefit trade-off. Cases which went to the third step (reconsideration request) showed a slightly higher profile (18 percent higher than the average forfeiture demand for all closed cases), and open cases showed an even higher profile than closed cases. That the breakeven point is quickly reached if further supported by impressionistic evidence gathered from a review of case files. Several respondents paid under protest, asserting that further contest would not be worth the cost. In one case, for instance, a radio station was assessed a $2000 forfeiture for broadcasting an advertisement of a lottery scheme. The licensee submitted two lengthy letters in which it vigorously argued that it had exercised due diligence in attempting to ascertain whether the promotion was in fact a "lottery." When the BB staff persisted in its claim for the $2000 forfeiture, the licensee paid under protest, asserting that "the cost of further litigating this matter would exceed the amount of the forfeiture."

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[291] *See* pp. 41, 52, 64–65 *supra*.

The BB mitigated the assessed penalty in only 11 (24 percent) of the 45 cases in which mitigation was sought. The average reduction in these cases was substantial (80 percent), primarily because the penalty was rescinded altogether in seven of the cases, presumably because no provable offense was established. In the remaining four mitigation cases, the average reduction was only 46 percent. The overall impression one gets from looking at the data, then, is a system in which reductions in penalty amounts are extremely rare.[292] For the most, part, the staff adheres to the amount that it initially sets. The degree of compliance (or submission) revealed by this portrait seems significantly higher than that characteristic of the mining industry and the polluters pursued by the Coast Guard.[293] FCC staff claim that its multi-level pre-assessment screening process effectively filters out dubious assertions of liability. While this is probably true, there is no reason to believe that disputes about liability are any more common in the mine safety or oil spill programs. Most common violations in all three programs are susceptible to relatively objective and reliable measurement: disputes about liability are uniformly rare. In fact, the Communications Act contains a potential breeder of disputes not found in the mine safety or water pollution statutes: namely, the question of intent. Most broadcast-related forfeitures may be assessed only for "willful or repeated" conduct; the other two acts employ a strict liability standard.[294]

Station managers sometimes object to a forfeiture assessment on the grounds that they were not personally aware of the violation, since the violation concerned a technical matter, such as power output, entrusted solely to the station's engineer. In other cases, managers claim that immediate corrective action evidences their good faith. Since "willfulness" is often difficult to prove, the FCC staff usually relies, instead, on the prohibition against "repeated" violations. The FCC treats a violation as "repeated" if the instant violation continued for more than one day. This latter interpretation has been upheld by the courts.[295] This interpretation may be attacked as unfair to the licensee since it does not require that he be given notice of the first violation in the series so as to enable him to forestall forfeiture liability by taking corrective action.[296] But the statute does not expressly require a prior warning—indeed its express requirement of a prior warning to non-licensees[297] implies that none need be given to licensees. The great advantage to the agency of relying on the "repeated offense" approach is that it largely eliminates an otherwise important source of factual dispute. The prior offense can usually be established with the same degree of objectivity or certainty as can the penalized offense itself, especially when the two offenses are part of a related pattern of conduct. It appears that the most significant function served by the FCC's mitigation process is to educate violators—that is, to inform them that where violations are "repeated," willfulness is irrelevant.

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[292] Professor Goldschmid made the same observation, Goldschmid, *supra* note 6 at 922.

[293] *See* pp. 235–36, 251–52 *supra*.

[294] *Compare* 47 U.S.C. § 503(b)(1)(A) and (B) (Supp. 1978), *with* 30 U.S.C. § 820(a) (Supp. 1977) *and* 33 U.S.C. § 1321(b)(6) (1976).

The fact that legitimate disputes about the occurrence of a violation are rare does not, however, necessarily signify licensee satisfaction with the amount of penalty assessed. Until 1978 the Communications Act provided no explicit guidance to the agency in setting forfeiture amounts. Secton 503 now requires the Commission to "take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[298] The Commission's implementing regulations merely echo the statutory language,[299] however, and its notices of apparent liability have typically given the licensee no basis for evaluating the fairness of the assessment.

The Commission staff claim that the principal source of standards is the body of precedent that has developed over the years. The forfeiture orders and orders of the Commission comprise a body of written opinions, available to the public on request, from which one can deduce the factors that illuminate agency decisions. It is true that forfeiture orders typically contain an admirably thorough discussion of the factors leading to the staff conclusions that an offense was committed. However, the orders themselves rarely provide much explicit guidance on the basis for assigning a particular forfeiture amount. While forfeiture orders are not uncommon (44 were issued by the BB in 1977), the range of violations covered is so broad that the number bearing on a particular issue is not likely to be large. Furthermore, the orders are not apparently collected or indexed by subject matter. They are filed by licensee, an arrangement that facilitates "prior history" checks, but not a review of related precedents. The staff does, however, keep a written log of cases from which one could identify orders bearing on a particular issue. The major difficulty with the precedent system is the high cost of using it.[300] A licensee who wishes to ascertain the Commission's standards must conduct a time-consuming file check whose cost will usually exceed any potential benefit to be derived in reduction of forfeiture amount.

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[295] United States v. Daniels, 418 F. Supp. 1074 (D.S.D. 1976). *See also* William City. Broadcasting Sys. v. FCC, 569 F.2d 161 (D.C. Cir. 1978); FCC v WIYN, Civ. No. C77-65R (N.D.Ga. 1978), discussed in Broadcasting, Jan. 1, 1979, at 63, *appeal docketed,* No. 79-1410 (5th Cir. Feb. 9, 1979).

[296] *Cf.* George Hyman Constr. Co. v. OSHRC, 532 F.2d 834 (4th Cir. 1978) (before employer may be penalized for "repeated" occupational safety violations, he must be given actual notice of prior violation).

[297] 47 U.S.C. § 503(b)(5) (Supp. 1978).

[298] 47 U.S.C. § 503(b)(2) (Supp. 1978).

[299] 47 C.F.R. § 1.80(3), *as amended by* 43 Fed. Reg. 49308 (1978).

The willingness of licensees to submit to initial forfeiture claims, then, is probably due to factors other than, or additional to, the clarity of agency standards. The relatively low sums involved would tend to discourage protests in any event. But most FCC broadcast licensees—particularly those most frequently cited for violations—are relatively marginal operators to whom a $1000 penalty could be significant. The evidence seems to confirm the oft-stated hypothesis that the more complete the regulatory scheme, the greater the degree of submissiveness. Enterprises which owe their existence to the initial and indefinitely renewable approval of an administrative agency are not likely to protest regulatory interference with as much vigor as their less completely regulated counterparts might.

B. Safety and Special Radio Services Bureau

1. Statutory Authority

The Safety and Special Radio Services Bureau (SSRSB) enforces eight civil forfeiture statues. Six of these relate to statutory requirements that ships and vessels be equipped with adequate radio communication devices in proper operating condition.[301] All of these "ship forfeitures" are established at a fixed level of $500 per day of offense for vessels and $100 per offense for masters of vessels. Imposition of forfeitures against vessels requires no finding of fault; imposition against masters requires a finding of "willfulness." All forfeitures are recoverable by way of civil suite (or libel, in the case of vessels), but may be remitted or mitigated by the Commission.[302]

Until 1978, most of the SSRSB's forfeiture activity was based on section 510 of the Act,[303] which authorized imposition of forfeitures against all special radio licensees of the FCC for "willful or repeated" violations of statutory, regulatory, or license provisions applicable to their conduct. The maximum allowable penalty was $100 per offense and $500 for all offenses committed during any 90-day period. The Commission was requied to issue a notice of apparent liability and to afford the licensee the opportunity to respond in writing and, upon request, to have a "personal interview with an official of the Commission at the field office of the Commission nearest to the person's place of residence."[304] The 1978 amendment repealed section 510 and broadened section 503 to cover all offenses formerly covered by section 510. The effect of that change has been to eliminate the requirement of a "personal interview," to authorize the use of the optional "administrative imposition" method, and substantially to increase the penalty limits. But the SSRSB's experience under section 510 remains a useful lesson in the adminstration of a small-penalty enforcement scheme.

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[300] *See* p. 347 *infra.*

[301] 47 U.S.C. §§ 362(a), 362(b), 386(a), 386(b), 507(a), 507(b) (1976).

[302] 47 U.S.C. § 504(b) (1976).

[303] 47 U.S.C. § 510, *repealed by* Pub. L. 95–234, § 4, 92 Stat. 35 (1978).

2. *Citizen Band Forfeitures*

As Table VIII shows, the great bulk of the Commission's forfeiture activities in the special radio field involves enforcement of citizen band regulations. The recent boom in CB usage has imposed an extra-ordinary increase on the agency's workload. The number of forfeitures involving CB violations increased five-fold (from 503 to 2526) from 1973 to 1976. During that period, the percentage of special radio service enforcement actions involving CB increased from 52 percent to 86 percent. There are presently some 13,400,000 CB operators holding licenses from the FCC,[305] plus an undetermined but undoubtedly substantial number of additional unlicensed operators. Knowledgeable observers claim that even with the maximum conceivable amount of enforcement resources, the FCC can never hope to do more than scratch the surface of the violations committed by this huge, widely scattered, diverse and often fiercely independent group of amateur radio operators.[306]

The enforcement technique most commonly employed by the agency is the "strike".[307] A group of investigators assigned to one of five special enforcement centers operated by the Field Operations Bureau moves into a community for several days. Using mobile monitoring devices and direction-finding equipment, the strike force detects and records offending transmissions and locates their source. Most enforcement is directed at stationary sources (usually a station operated from the home), since location and identification of mobile sources is difficult. Once having detected the

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[304] Section 510(c).

[305] GAO FOB Report, *supra* note 255 at 38.

[306] *Cf.* Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs,* 64 Va.L.Rev. 169, 243–45 (1978).

[307] GAO FOB Report, *supra* note 255 at 16–18.

TABLE VIII

FEDERAL COMMUNICATIONS COMMISSION ENFORCEMENT SANCTIONS AGAINST SPECIAL RADIO SERVICE LICENSEES, BY CLASS, FISCAL YEAR 1977[1]

	Citizens	Amateur	Ship	Aviation	Land Transportation	Industrial Public Safety	Total
License Revocation Proceedings[2]							
Cases Pending October 1st 1976	184	18	54	6	4	18	284
Cases Started Fiscal Year 1977	176	35	216	19	46	137	629
Closed by Revocation	87	14	82	5	16	30	234
Closed by Dismissal	70	26	135	10	34	77	352
Cases Pending September 30th 1977	203	13	53	10	0	48	327
Cease and Desist Proceedings							
Cases Pending October 1st 1976	33	0	0	0	0	0	33
Cases Started Fiscal Year 1977	0	0	0	0	0	0	0
Closed by Cease and Desist Order	7	0	0	0	0	0	7
Closed by Dismissal	5	0	0	0	0	0	5
Cases Pending September 30th 1977	21	0	0	0	0	0	21
Forfeiture Proceedings							
Cases Pending October 1st 1976	762	3	55	0	23	11	854
Forfeiture Notices Issued Fiscal Year 1977	1425[3]	51	89	2	90	134	1791
Closed by Payment	1298	40	60	2	78	93	1571
Closed by License Surrender	10	0	0	0	0	0	10
Closed by Remission	20	1	12	0	5	29	65
Closed as Uncollectible	580	3	18	0	7	6	614
Cases Pending September 30th 1977	279	10	54	0	23	17	383

1. Source: Federal Communications Commission, Annual Report, Fiscal Year 1977.
2. Includes License Supension Proceedings.
3. 1384 Issued by FOB, 41 by SSRSB.

violation, the investigators request admission to the station, and if admitted, inspect the station and note their findings on a reporting form.[308] The license application form signed by licensees contains a recitation that the licensee will allow inspection of the station at a reasonable hour. If the operator refuses admission, the investigator advises him that his license may be revoked or, if not licensed, that criminal action may be instituted. In some instances, the investigator issues a "notice of violation" comparable to that used in broadcast regulation. If the violation is minor, he issues the notice merely as a warning. In more serious cases, however, the investigator will recommend the imposition of a penalty to the FOB headquarters office, after which the process is essentially the same as in the broadcast case, except that the ultimate decision on what sanction to invoke is made by SSRSB.[309]

There are, however, five types of common and relatively serious CB violations for which the FCC has delegated authority to the FOB to issue a notice of apparent liability directly.[310] For each offense, the Commission has specified the forfeiture amount. The violations, and first-offense penalty amounts are: use of excess power[311] ($100); use of unauthorized frequency[312] ($100); communicating beyond 150 miles[313] ($75); overheight antenna[314] ($75); and failure to identify transmission by assigned call sign[315] ($50). For second and subsequent offenses, the penalty for each is $100. Upon detecting any of these violations, the investigator issues a combined notice of violation-notice of apparent liability[316] in which the inspector simply checks the appropriate items and fills in a summary description of the offense (such as the improper call sign used, or height of antenna) and the date and time of the offense. The forfeiture for each offense is specified, as is the total apparent liability. The notice includes a reply form inviting the respondent either to pay the forfeiture, submit written reasons "why the apparent forfeiture should be reduced or not imposed," or request a personal interview at the nearest field office.[317]

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[308] FCC, Citizens Radio Service Inspection Report, Form FO-985, April 1974. The violation is first recorded on an "Operations Log" (FCC Form FO-984-A, February 1974).

[309] In the case of particularly serious violations, SSRSB institutes license revocation proceedings, in which the licensee may have a hearing before an ALJ. The agency conducts approximately 50 such hearings per year.

[310] FCC, Public Notice, "Forfeiture Amount Levied to Vary" April 26, 1977. *See* 47 C.F.R. §§ 0.110, 0.311 (1977).

[311] 47 C.F.R. § 95.613(b) (1977).

[312] 47 C.F.R. § 95.455(a) (1977).

[313] 47 C.F.R. § 95.501(b) (1977).

[314] 47 C.F.R. § 95.437(a) (1977).

[315] 47 C.F.R. § 95.471(c) (1977). The FOB is also authorized to assess a forfeiture directly for "repeated failure to reply to Commission Notices" ($50). 47 C.F.R. § 1.89 (1977).

[316] FCC Form 793-L, May 1977.

[317] FCC FORM 793-R, August 1975.

The interview, if held, is conducted by a person assigned to the field office, always an engineer and often the engineer in charge, with a clerk or other witness present.[318] The interviewer takes notes on the respondent's assertions and arguments. The interviewer may answer general questions about Commission policy, but has only the inspection report and notice as a basis for answering specific factual objections and has no authority to cancel or reduce a forfeiture. Consequently, the interviewer's role with respect to factual questions or allegations is purely clerical. After the interview, the case file, including the interviewer's notes, is transmitted to FOB headquarters, reviewed and forwarded to SSRSB for decision on the mitigation request. The bureau chief then sends a letter to the licensee advising him of the decision—almost always a denial—on the mitigation request. Until recently, denial letters simply recited: "You have given us no facts which warrant any change in the amount of forfeiture levied." For first offense cases assessed at a level below the pre-1978 statutory limit of $100 per offense, letters typically noted that the violation "could have been assessed" at $100, suggesting, in effect that whatever mitigation might be warranted had already been given. Now, letters respond more specifically to points raised in the licensee's request for mitigation. While the Commission's rules afford dissatisfied respondents an opportunity to petition for reconsideration and for Commission review, only about five percent of CB violators request reconsideration, almost invariably without success.

3. *Anticipatory Mitigation*

The evolution of CB forfeiture policy illuminates several aspects of the penalty assessment and mitigation process. One is the question of assessment and mitigation strategy. Prior to 1975, the agency always assessed violations at the statutory maximum ($100 per violation) and then routinely reduced the assessment to $25 upon a request for mitigation ($50 for second offenses, no mitigation for subsequent offenses).[319] No reason had to be given for the mitigation request—the violator had merely to check an appropriate box on the form. The potential for injustice in such a system was obvious. SSRSB officials recount the example of two cases involving similar amateur radio license violations, one involving a religious order and the other a national beverage bottler. The religious order compliantly sent in a check for the full amount of the $400 penalty while the bottler hired a Washington lawyer to reduce the penalty to $100.

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[318] *See* 47 C.F.R. § 1.80(h) (1977). The provisions dealing with personal interviews were eliminated by 43 Fed. Reg. 49309 (1978).

[319] *See* Comptroller General of the United States, Fundamental Changes Needed to Achieve Effective Enforcement of Radio Communication Regulations 24–27 (1972); Goldschmid, *supra* note 6 at 922.

The pre-1975 policy was also costly to administer. Only about 15 percent of the forfeitures (then running at about 1700 per year) were paid in full.[320] The cost of processing reduction request, even though almost all of them were routinely honored, was, therefore, considerable. In an attempt to reduce inconsistencies in treatment of offenders and to raise the level of direct payment, the Commission decided to adopt uniform $50 forfeitures for all CB first offenses ($100 for subsequent offenses), with the understanding that the forfeiture would be reduced or cancelled only in "very unusual cases, if circumstances justify it."[321] The notice invited respondents to request mitigation because of "extenuating circumstances."[322] Nowhere did the agency provide further guidance as to what might constitute an "unusual" or "extenuating" circumstance. Agency staff did not consider this lack of guidance a serious infirmity since it almost never granted a mitigation request. The schedule in current use replaced the fixed penalty of $50. While the agency continues to invite mitigation requests—as it feels it must under the statute—reductions almost never occur.

The agency's use of an objective penalty schedule in this context is, of course, partly a function of the relatively high volume of cases processed. In fiscal year 1976, the agency issued over 2500 forfeiture notices for CB violations. An important additional consideration, however, was the question of internal agency jurisdiction. The category of serious CB violations described earlier is the only significant category of violations for which the FOB may directly assess the forfeiture.[323] All other forfeitures, though based on FOB inspection, are assessed by the appropriate substantive bureau. The principal reason for the exception in this case was one of time. Section 510 required the notice of apparent liability to issue within 90 days of the alleged violation.[324] The Commission concluded that a substantial volume of additional violations would so burden the existing multi-step processing system as to prevent the agency from meeting that deadline. To compensate for the loss of central control over the assessment process, the Commission imposed fixed, nondiscretionary penalty amounts. Now that the 90-day period of limitations has been replaced by a one-year period,[325] there are some in the SSRSB who would like to gain back control over assessment decisions. One source of conflict is how to handle cases of particularly serious, repeated or callous violations.[326] The field staff now has the effective discretion to issue a simple forfeiture notice or refer the case for more serious sanction (criminal prosecution or license revocation action). Differences of opinion about enforcement policy for serious violations might induce SSRSB officials to seek to strip FOB of its assessment powers. Set against this is the argument of FOB that the near-simultaneous issuance of a large quantity of assessment notices within an area immediately after a "strike" has a ripple effect throughout a CB community which would be lost if cases had to be processed through headquarters.

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[320] Memorandum from Chief, SSRSB, to the Commission, June 18, 1975, at 3.

[321] Memorandum from Chief, SSRSB, to Chief, FOB, June 30, 1975, at 1.

[322] *Id.* at 4.

[323] The FOB is also authorized to assess forfeitures for improper use of equipment by persons other than the licensee, unauthorized operators, and sellers of prohibited equipment. But the number of forfeitures in these categories is small.

[324] 47 U.S.C. § 510(c), *repealed by* Pub. L. 95-234, § 4, 92 Stat. 35 (1978).

[325] 47 U.S.C. § 503(b)(6)(B) (Supp. 1978).

[326] *See* GAO FOB Report, *supra* note 255 at 35–36.

4. Personal Interview

A second question highlighted by the CB program is the utility of the personal interview. It may appear incongruous at first that the Communications Act required a personal interview for Section 510 forfeitures but not for section 503 forfeitures. Forfeitures under the former have, on average, been substantially smaller and are no more likely to raise disputed issues of fact or interpretation. The requirement of an interview under section 510 may have been justified, however, by an assumption that section 510 licensees are less sophisticated about FCC standards and procedures than broadcast licensees. This seems particularly likely of CB licensees. For them, the licensed activity is a casual activity. They do not depend on the license for their livelihood. As individual licensees, they are unlikely to have expert legal or other counsel to assist them in interpreting official requirements. As my review of sample case files suggested, many CB licensees probably lack the ability to express themselves clearly in writing.

Nonetheless, some FCC staff regard the personal interview as a waste of time and effort. There are several reasons why this appears to be true. First, since roving strike teams gather the evidence in CB cases, the interviewer rarely has any personal knowledge of the case, or even any means of readily obtaining information, beyond the written report. For this reason, as well as the jurisdictional resistance of SSRSB to delegating discretionary mitigation authority to FOB, the interviewer is reduced to the role of stenographer for the licensee. The most important reason for the interview's limited usefulness, however, is the infrequency of factual or interpretive disputes. The five CB violations selected for most common enforcement are susceptible to exact determination by electronic measuring or recording devices or direct observation. Since the agency does not wait until the CB violation is "repeated," the question of "willfulness" is theoretically present. But the FCC has, in effect, established an almost irrebuttable presumption that those five offenses are willful. This presumption seems justified in most cases. Overheight antenna or overpower operation require illegal equipment. Communication on an improper frequency or beyond 150 miles appear to require knowledge and cooperation. But it is not always self-evident that an offense subject to forfeiture reflects "willfulness." For example, while the use of an unauthorized call signal may fairly be regarded as deliberate, simple failure to identify a transmission with any call sign at all might result from mere carelessness. The argument—occasionally made—that an improper transmission was made by a minor child or other person not authorized by the licensee to use the equipment is brushed aside on the grounds that licensees have an obligation to control use of their equipment. In short, although the presumption of willfulness is undoubtedly justified in the vast majority of cases, the agency has in effect adopted a strict liability standard in order to minimize the cost of processing a large volume of relatively trivial cases.

Agency assertions of the interview's uselessness have become a kind of self-fulfilling prophecy. At one time, interviews were requested with some frequency: interviews were held in about one quarter (287) of all CB forfeiture cases in fiscal year 1975. The agency then included in its description of the interview option on its "reply" form a statement that the interviewer had no authority to change or cancel the forfeiture, but merely recorded the licensee's comments and transmitted them to headquarters.[327] The number of interview requests dropped precipitously. In fiscal year 1977, only 26 interviews were held. It seems likely that increased public awareness of FCC rules had something to do with this decline, but FCC staff attribute it to the change in language. This decline in the number of interviews is probably not to be lamented—nor, indeed, would the entire elimination of the practice. So long as the FCC confines its CB forfeiture cases to highly objective, readily verifiable offenses, the only useful function to be served by an interview process is explanatory. Surely the Commission's notices to licensees can be designed in such a way as to serve that function adequately.

5. *Collection Difficulties*

The CB enforcement program also illustrates the difficulty of collecting small fines. As Table VIII indicates, the number of CB cases closed as uncollectible is very substantial. The 580 cases closed as uncollectible in fiscal 1977 represent 30 percent of the 1908 cases closed that year. The government does not make a very aggressive effort to collect unpaid forfeitures. The usual practice is to send one dunning letter after the licensee ignores a forfeiture notice or subsequent correspondence. If the respondent fails to reply to the dunning letter, SSRSB closes the case as uncollectible. At one time the FCC referred such cases to the Justice Department for collection action, but in 1966 the Department required agencies to obtain a credit report on debtors as a condition of accepting a case for collection.[328] Since the cost of securing a credit report usually exceeded the value of the forfeiture (CB collections were averaging about $80 per case), the FCC simply discontinued referring cases.[329]

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[327] *See* FCC Form 793-R, August 1975.

[328] *See* 4 C.F.R. § 105.3 (1978).

Other avenues for collection are not promising. The FCC could attempt to issue a cease and desist order[330] or to revoke the license of a repeat offender.[331] But it takes the position that the fact of previous failure to pay a forfeiture cannot be used as a basis for any other administrative sanction unless the refusal to pay follows a court order.[332] Administrative process looking toward a cease and desist order or a license revocation is itself expensive, and is no assurance that the operator will discontinue the offending practices. If the violator continues to operate after license revocation, the Commission may be able to convince a United States Attorney to institute criminal proceedings against unlicensed operation. Although prosecutions have been comparatively rare, the penalties typically imposed—fines of $500 to $1500 and sometimes an order to surrender the transmitting equipment—are severe enough to be effective.

It might be suggested that a strengthening of the personal interview procedure might increase the rate of compliance as it apparently did in the coal mine safety program.[333] But the contexts are too dissimilar to warrant optimism on that score. Coal mine operators, for all their legendary stubborn individualism, depend on MSHA for their livelihood. They are closely and repeatedly inspected by MSHA, and they know that they can be closed down by MSHA. CB operators on the other hand, do not depend on the FCC for their livelihood and, in view of the widespread unlicensed operation, may feel no dependence on the FCC even for their amusement. Furthermore, the coal mine penalties are, on average, higher than CB penalties, and correcting the underlying violation often costs a good deal more. Finally, however apparently mechanical MSHA's penalty formula, it leaves a good deal of discretion for assigning points for some factors, whereas applying the CB penalty schedule is a simple and almost totally mechanical process. Consequently, there is little reason to believe that the conference system used with some success in the mine safety context would produce similar results here. In fact, the data appear to support this contention, since the rate of collection has not dropped since the Commission began to discourage personal interviews around 1975.[334]

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[329] *See* GAO FOB Report, *supra* note 255 at 21. The FCC's reluctance to take more aggressive action to collect small forfeitures is probably also attributable to the general disincentive resulting from the operation of federal fiscal laws. Since forfeiture payments are credited directly to the Treasury, the agency receives no direct fiscal benefit to compensate for expenditure of its limited appropriated funds on collection activities. One way to counteract this disincentive is to permit the agency to retain sums which it collects in a special fund available for expenditure without further appropriation. Congress has authorized the creation of such funds in only a handful of cases. *See* 7 U.S.C. § 1359(a) (1976) (penalties for marketing peanuts in excess of quota to be deposited in "special deposit account . . . administered by the Secretary [of Agriculture]"); 12 U.S.C. §§ 1425b, 1464(d)(12)(B) and 1730(p)(2) (1976) (penalties for various regulations affecting federal savings and loan corporations may be recovered by FHLBB "for its own use"); 29 U.S.C. § 216(e) (1976) (penalties for violation of child labor laws to be deposited in special fund authorized by 26 U.S.C. § 9(a) (1976), to be "applied toward reimbursement of the costs of determining the violation and assessing and collecting such penalties"); 33 U.S.C. § 914 (1976) (penalties collected for violation of longshoremen's and labor workers' compensation law reporting requirement to be deposited in special fund authorized by 33 U.S.C. 2944 (1976)); and 33 U.S.C. § 1321(k) (Supp. 1977) (penalties collected for oil spills to be deposited in revolving fund for enforcement of law and clean-up of spills). *Cf.* 16 U.S.C. § 576c (1976) (revolving fund for forest management).

[330] 47 U.S.C. § 312(a) (1976).

[331] 47 U.S.C. § 312(b) (1976).

[332] 47 U.S.C. § 504(c) (1976) provides:

> "in any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this chapter, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued,
>
> (i) the forfeiture has been paid, or
>
> (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final."

The Commission staff interprets this language—correctly, I think—also to prohibit the collateral use of the "fact" of nonpayment in a manner prejudicial to the accused.

A more hopeful approach might be to utilize the administrative-imposition option in CB cases.[335] A summary administrative adjudication against a licensee who ignored a forfeiture notice could then be enforced in a summary judicial collection action. This procedure might be more expeditious than the present de novo trial procedure. But the cost of even such a summary process would not be justified unless it stimulated a higher rate of voluntary payment. It is not clear that the shift to administrative imposition would substantially increase voluntary payment. If a CB licensee ignores an official forfeiture notice from the Chief of the SSRSB now, will he obey an official order from an FCC ALJ any more readily? The asserted reasons for the high level of non-compliance—lack of tradition of regulatory dependence, lack of financial stakes, personal characteristics associated with CB use—would not seem affected by such a superficial change. All of this lends credence to those who assert that the benefits of CB regulation simply do not justify the costs.[336]

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[333] *See* pp. 234–36 *supra.*

[334] Although the FCC did not report the number of cases closed as uncollectible prior to fiscal 1975, the number of cases "pending" at the end of fiscal years 1973 and 1974 bore about the same relation (40%) to the number of cases closed during those years as the sum of the "pending" and "uncollectible" cases in subsequent years bore to the total closed in those years.

[335] That is, the formal agency adjudication authorized by 47 U.S.C. § 503(b)(3)(A) (Supp. 1978).

[336] *E.g.*, Robinson, *supra* note 306 at 243–45.

6. *Ship Forfeitures*

The SSRSB also has jurisdiction over some 46 other radio services, including marine, aviation, land transportation, industrial, public safety, and amateur. As Table VIII shows, collectively these other categories account for only a small fraction of its forfeiture activities (20 per cent of forfeiture notices issued, 17 per cent of forfeiture cases closed in fiscal year 1977). The enforcement process for ship forfeitures assessed under Title III and section 507 of the Act is identical to that used for broadcast licensees. SSRSB assessed other classes of forfeitures which were assessed under section 510. As in CB cases, it offered an opportunity for personal interview in all cases, but unlike CB cases, notices of apparent violation are issued by SSRSB headquarters only, not by field personnel.

The ship forfeiture cases illustrate the problem with fixed penalties. These statutes carry fixed penalties of $500 per day against the vessel.[337] A vessel completing one or more voyages without proper radio equipment could easily amass a forfeiture liability in the tens of thousands of dollars. The high fixed liability may, of course, be mitigated on request. The Commission has long taken the view that it must assess the forfeiture at the full statutory amount,[338] but will then reduce that amount to a relatively small amount in most cases since, in its experience, violations are infrequent, rarely deliberate, and almost never repeated. As a result, Commission records often showed a huge disparity between amounts assessed and collected (see Table IX).[339]

An internal memorandum to the Commission written by SSRSB staff in 1963 set forth the staff's policy on mitigation requests.[340] The staff classified violations by statutory authority and severity and attached to each class a fixed forfeiture amount in most cases or a range of possible forfeitures in a few cases. Since it employed ranges in comparatively few cases and the largest range is $250 to $500,[341] the policy reflects a high degree of objectivity and specificity. This policy has apparently been followed since 1963.[342] Somewhat embarrassed, however, by the large disparity between assessed amounts and mitigated amounts, the agency did change its policy on assessing initial forfeitures. Beginning in 1975, it authorized the staff to set initial assessments at a level closer to the expected final amount by adjusting downward the number of days of offense for which a forfeiture was assessed.

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[337] *See, e.g.,* 47 U.S.C. § § 362(a), 386(a) (1976).

[338] The correctness of this conclusion is challenged at p. 334 *infra.*

[339] *See also* Comptroller General of the United States, *supra* note 319 at 24 ($94,400 assessed in fiscal year 1971, $920 collected: ship penalties only).

[340] Memorandum from Chief, SSRSB, to The Commission, October 30, 1963.

[341] *Id.* at 3.

[342] *See* Memorandum, *supra* note 320 at 1.

TABLE IX

CIVIL MONETARY FORFEITURES ASSESSED AND COLLECTED, SPECIAL RADIO LICENSES, FISCAL YEARS 1972-1976[1]

Fiscal year	Number of cases	Total amount assessed	Average assessment per case	Total amount collected	Average collection per case	Collection ratio
1972	NA	$1,358,000	NA	$ 56,972	NA	4%
1973	666	$ 219,100	$329	$ 38,525	$58	18%
1974	1041	$ 327,900	$315	$ 70,266	$67	21%
1975	1271	$ 591,550	$465	$ 88,501	$70	15%
1976	2084	$ 277,150	$133	$135,285	$65	49%

1. Source: Federal Communications Commission, Annual Report, Fiscal Years 1972, 1973, 1974, 1975, 1976.

VIII. CASE STUDY IV: INTERSTATE COMMERCE COMMISSION

A. *Statutory Authority*

The Interstate Commerce Act contains 11 statutory civil money penalty provisions enforced by the Interstate Commerce Commission.[343] These statutes utilize the old terminology of "forfeiture". The statutes confer no explicit authority on the Commission either to assess or to mitigate the forfeitures. They may be enforced only by initiation of a civil action in federal district court:[344] The Commission's formal role is limited to referring forfeiture cases for prosecution.

Despite this lack of formal authority, the Commission has developed a procedure for making and compromising forfeiture claims which avoids the necessity for referral in the great majority of cases. The authority utilized by the Commission for this role is the Federal Claims Collection Act.[345] As Table X shows, this procedure has been used to conclude an average of over 400 forfeiture cases per year, involving total collections of nearly $1,500,000. The average collection per case has been nearly $3,500.

Over 90 percent of the ICC's forfeiture activities have involved offenses by motor common carriers. The motor carrier offense most frequently penalized by the ICC is operating without authority—that is, carrying commodities or operating on routes not authorized by a certificate of public convenience and necessity.[346] Unauthorized operations offenses are

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[343] 49 U.S.C. §§ (12), 1(17), 1(18)(e), 1a(9), 6(10), 16(8), 20(7)(a), 20(7)(d), 41(3), 322(h), 21(e) (1976).

[344] *See, e.g.*, 49 U.S.C. § 6(10) (1976) ("civil action brought by the United States"); 49 U.S.C. § 20(7)(a) (1976) ("suit by the United States Attorney").

[345] 31 U.S.C. § 951–53 (1976), discussed at pp. 218–19 *supra*.

[346] 49 U.S.C. § 322(h) (1976). This statute also provides for the imposition of forfeitures upon motor carriers for record keeping violations.

TABLE X

CIVIL FORFEITURE CLAIMS SETTLED BY THE INTERSTATE COMMERCE COMMISSION, FISCAL YEARS 1972–1977[1]

	Fiscal Year					
	1972	1973	1974	1975	1976	1977
Number of Claims Commenced	485	542	491	421	468	N/A
Rail	28	28	55	36	40	N/A
Motor	457	514	436	385	428	N/A
Number of Claims Settled	437	465	461	368	363	N/A
Rail	27	27	46	34	37	N/A
Motor	410	438	415	334	326	N/A
Amount Collected	1,123,270	1,175,225	1,795,215	1,528,733	1,404,097	1,718,500
Rail	571,140	434,275	945,629	886,878	665,237	961,500
Motor	552,130	740,950	849,586	641,855	738,860	757,000
Average Collection Per Case	2,570	2,527	4,154	3,894	3,868	–
Rail	21,153	16,084	20,557	26,085	17,979	–
Motor	1,347	1,692	2,047	1,922	2,266	–

1. Source: Letter from A. Daniel O'Neil, Chairman, ICC, to Robert A. Anthony, Chairman, ACUS, March 2nd, 1978.

usually reported by competing carriers. Recently the Commission announced its intention to reduce its emphasis on enforcing operating restrictions and expand its efforts to enforce regulations designed to protect shippers from overcharging or inferior service. The Interstate Commerce Act authorizes a forfeiture of up to $500 for each motor carrier violation plus up to $250 each day such violation continues. Collections in motor carrier cases have averaged about $1,830 per case in recent years.

Rail cases, on the other hand, though few in number (averaging only 34 per year from 1972 to 1976), typically involve much larger sums of money than motor cases.[347] The average collection per rail case during those years was nearly $20,000. There are two common types of offenses included in this category. The first type involves violations of car service orders—orders by the Commission to railroads to repair and move railroad cars to meet shippers' requirements.[348] Violation of a car service order is punishable by a forfeiture of between $100 and $500 per offense plus $50 per day of continuation. Since violations by major carriers often involve large numbers of cars improperly held for many days, potential forfeiture liabilities in the hundreds of thousands of dollars are common. In an effort to focus its enforcement activities on major violations, the Commission has recently made several spectacular forfeiture demands, including one against Southern Pacific for $4,486,950 and one against Con Rail for $2,400,000.[349]

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[347] This difference carries no implication for the relative effectiveness or severity of rail or motor carrier forfeitures, since most rail forfeitures involve violations of statutory prohibitions either inapplicable to motor carriers (*e.g.*, violation of car service orders) or not punishable by forfeiture under the motor carrier statute (*e.g.*, rate rebates).

[348] 49 U.S.C. § 1(17) (1976).

A second common rail-related forfeiture involves the receipt by a shipper of a rebate or offset from a published tariff rate in violation of the Elkins Act.[350] The forfeiture prescribed for such an offense is a sum equal to three times the value of the rebate or offset received.

Since the ICC has no express statutory authority to assess or even mitigate forfeitures, at one time it merely turned over the results of its investigations to the United States Attorneys for such action as they deemed appropriate. In 1970, the Justice Department directed the Commission to attempt to settle forfeiture claims under the Federal Claims Collection Act before referring cases for prosecution. The Commission has proceeded to develop a claim settlement process that has eliminated the necessity to refer all but a handful of cases for prosecution each year.[351] The ICC has delegated to the Director of its Bureau of Investigations and Enforcement the authority to settle or terminate all forfeiture claims.[352] Until 1977, all rail claims were issued and negotiated at headquarters. Motor carrier claims were issued by district offices, where they could be settled but only at a sum in excess of a minimum figure approved at headquarters. In 1977 the Commission decentralized responsibility for issuing and settling all forfeiture claims to the district offices, subject only to subsequent reporting to headquarters.

B. *Forfeiture Settlement Procedure*

The forfeiture settlement procedure, as described in ICC rules, is disarmingly simple. The ICC initiates the process by mailing a "notice of claim" to the "debtor," which must "state the statutory basis for the claim, a brief resume of the factual basis for the claim, the amount of the claim, and indicate the availability of the (collection agent) for discussion of the claim should the debtor so desire."[353] Execution of an "Agreement and Release Form" evidences settlement of the claim. The ICC has no other published rules or written policies describing the claim settlement process, nor written standards for determining an acceptable settlement amount.

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[349] ICC Press Release, June 15, 1978. The demands were subsequently reduced to $1,195,300 and $425,600, respectively, after the ICC extended the period within which a carrier must respond to a car service order from 24 to 60 hours. ICC Press Release, August 11, 1978.

[350] 49 U.S.C. § 41(3) (1976).

[351] 49 C.F.R. Part 1021(1978).

[352] 49 C.F.R. § 1021.3 (1978).

[353] 49 C.F.R. § 1021.4 (1978).

1. Investigation Report

To gain some insight into the process, I reviewed a sample of 20 forfeiture case files in the Boston District Office. Cases typically began with the submission of an investigative report. The investigator submits a form which contains space for "type of violation," "number discovered," and "number reported with evidence." The "evidence" typically consists of attached copies of freight bills or other shipping documents, from which one can often readily identify the offending action or operation. There is usually a substantial disparity between the number of offenses "discovered" and the number "reported with evidence." Since most common violations can be identified from shipping documents, there will usually be "evidence" to support most or all of the "discovered" violations. The disparity presumably reflects the investigator's judgment that, beyond a certain point, initial documentation of further violations is pointless. In an unauthorized operations case, the investigative report usually contains an estimate of the gross revenues received by the carrier from the operation. In the case of an illegal rebate or concession, the investigator estimates the value of the rebate or concession per shipment. Information on the number and amounts of prior forfeiture payments made by the shipper appears either in the investigator's report or in a "civil forfeiture information sheet" prepared by staff, accompanied usually by a proposed "minimum settlement figure."

2. Claim Notice

The "notice of claim" is a letter from the regional counsel to the alleged violator. The form and contents of the claim letters in the case files reviewed varied. All stated that the letter constituted the making of a forfeiture claim and cited the legal authority under which the claim was made (the Federal Claims Collection Act and implementing regulations and the statutory forfeiture provision). The description of the alleged violation was in all cases quite brief and conclusory—for example, "100 unauthorized trips up to March 8, 1978." The letters did not specify precise dates and contents or nature of shipments. In fact, many letters failed even to specify the number of alleged violations, merely citing "a number of instances." Almost none of the letters reviewed even stated the amount of the claim. While the letters routinely recited the statutory maximum per offense, they did not specify the number of offenses either "discovered" or even "documented." Regional officials indicated that this policy had been changed recently, and two very recent forfeiture letters reviewed did in fact specify the number of "documented" offenses cited. The apparent reason for the agency's reluctance to reveal the number of documented and discovered violations is the assumed pressure to settle imposed on the respondent by uncertainty about his maximum exposure. As the Director of the Bureau of Investigations and Enforcement explained, "during the negotiation stage, it is often made clear to the respondent that should the case be escalated to a formal enforcement proceeding, it may be necessary to document other counts."[354] While the ICC has an "open file" policy permitting a respondent to examine the "underlying carrier records of a civil forfeiture demand,"[355] the carrier cannot thereby ascertain how many undocumented violations the agency "discovered" and might subsequently document for purposes of preparing an enforcement action. The prospect of prosecution for an undetermined number of offenses may generate a powerful incentive to accede to the agency's demands.

The claim letter concludes with an invitation to the respondent to contact the regional counsel at a specified telephone number or address, and a warning that unreasonable failure to settle may result in institution of certificate revocation proceedings (for licensed carriers) or criminal prosecution (for non-licensees).

3. *Minimum Settlement Figure*

Although recipients of a forfeiture claim letter occasionally protest in writing, the usual response is an attempt to reach a settlement by telephone or in person. Internal memoranda in case files shed some light on this process. Before issuing the claim letter the regional office has typically established a "minimum settlement figure." It is far from clear how this figure is determined. Agency officials claim to base the minimum settlement figure in unauthorized operations cases on the gross revenues earned by the carrier from the documented violations, and there was in fact a correspondence between the two figures in several cases. In fact, one case involving a maximum possible forfeiture of $19,500 was settled for the improbable sum of $1,842.19, since that was the investigator's estimate of the respondent's revenues from the illegal operation. However logical the "revenues" figure is, it provides an objective-appearing point around which the two negotiation parties can agree.[356] Yet in most cases the estimated revenues from the unauthorized transportation bore no relationship whatever to the minimum settlement amount. In one recent case, the estimated revenues from 107 documented violations exceeded $103,000 (the statutory maximum was $53,500), and the minimum settlement figure was set at $4,000. Furthermore, the "revenue" figure derives from the number of "documented" violations, not the usually much higher number of "discovered" violations. For example, in one case settled at $2500, the estimated revenues for 25 "documented" violations were $11,250 and for 120 "discovered" violations, $54,000. Finally, to the extent that revenue from illegal operations is relevant to setting forfeiture amounts, it would seem logical to use a net revenue figure rather than a gross revenue figure. The former is at least a crude measure of the extent to which the violator profited from his misdeeds; the latter has no apparent logic to support its use.[357]

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[354] Letter from Peter M. Shannon, Jr., Director, Bureau of Investigations and Enforcement, ICC, to Jeffrey Lubbers, Senior Staff Attorney, ACUS, March 20, 1979, at 3.

[355] *Id.*

[356] On the importance of "focal points" in bargaining, see T. Schelling, The Strategy of Conflict 110–115 (1960).

It appears that, at best, the minimum settlement figure for unauthorized operations cases relates only crudely to the scale of such operations. Minimum settlement figures for unauthorized operations cases seem to cluster in the $1500 to $5000 range. Generally, the smaller the scale of "documented" illegal operations, the lower the minimum settlement figure within that range. The weight attached to history of previous violations is less clear. This information customarily appears in internal investigative reports. But the sampled cases display no clear and consistent pattern with respect to its relevance. For example, there were two cases of unauthorized operations involving carriers with two prior forfeitures. The minimum settlement figure in one case was $4,000, in the other $1500. In the former case, the carrier had, one year earlier, paid a $4500 forfeiture for the same type of unauthorized transportation and had been enjoined by a court not to repeat the offense! The regional counsel usually has information available to him on the financial condition of the carrier, but the indicators shown in staff memoranda are crude, and it is not apparent how the data influences the decision.

In cases involving receipt of rebates or concessions, the basis for determining a minimum settlement amount is at least equally mysterious. These cases carry a fixed statutory forfeiture equal to three times the "rate defeat" (the amount of the rebate or concession).[358] Headquarters staff claimed that agency policy is not to settle for less than one times the rate defeat—that is to deprive the shipper of his ill-gotten gains. Yet, in one major recent case involving a total alleged rate defeat of about $390,000 (and, therefore, forfeiture liability of $1,170,000), the regional office proposed an initial settlement figure of $100,000 and settled at $75,000. The settlement was conditioned upon an agreement by the shipper to pay the carrier the full $390,000. But the shipper would have been liable to the carrier for this amount in any event, since the shipper had misdescribed the shipments, thereby qualifying for a rate lower than the rate he should have paid.

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[357] *See* pp. 299–300 *infra.* Agency officials defend the use of gross revenues as the measure of harm done to the licensed transportation industry. Letter, *supra* note 354, at 4. But a licesened carrier would have incurred costs in carrying the freight and therefore is "deprived" only of the net revenues, not the gross revenues.

[358] 49 U.S.C. § 41(3) (1976).

Standards for determining settlement values are determined principally at the regional level. Prior to 1977 regional officials had no authority to settle rail cases, and could settle motor carrier cases only at or above an approved minimum settlement figure. This central control probably tended to assure some consistency among regions, although the documentation accompanying the request for an approved minimum compromise figure was sparse, and regions undoubtedly varied in their ability to drive a bargain above the approved minimum. Today, regional officials have complete delegated authority to settle both motor and rail cases. The "minimum settlement figure" is only an internal guideline: a regional negotiator may accept an offer below that level.

This is not by any means to suggest that the central office has wholly abandoned supervision of regional forfeiture practices. Headquarters officials visit the regions on a quarterly basis to discuss regional business including forfeiture cases. Under a "regional assistance program", central office staff conduct detailed reviews of forfeiture cases and provide guidance to regions showing disproportionately low settlement figures. For some special national enforcement programs—for example, enforcement of household goods transportation regulations—the central office establishes minimum settlement percentage figures which it communicates orally to district staff. A central computerized case tracking system, supplemented by periodic telephone calls to the regions, enables headquarters to monitor the progress of forfeiture cases.

In spite of this central oversight, the compromise process varies widely from region to region, depending largely on the personal style of the regional counsel or other responsible official. The Boston regional counsel typically made an initial demand in the first meeting between the parties (or in some cases via telephone). Notes in the case files indicate that he usually set the initial demand at a level in the vicinity of 25 to 50 percent higher than the predetermined "minimum settlement figure." The regional counsel customarily made it clear that he would entertain a counteroffer, but he usually took a firm position (at or near the minimum settlement figure) after one exchange of offers. Sometimes he attached conditions to the settlement such as a requirement that the carrier make restitution or submit a plan to prevent recurrence of the violation.

4. Negotiation

The settlement process apparently works quite expeditiously. Most cases examined were settled within two months, usually after one or two negotiating sessions and one or more telephone conversations. Despite the small size of average settlements, carriers retained counsel to represent them in virtually every case. The apparent reason for this is the fact that the initial notices either gave no indication of the carrier's total liability or suggested a much larger maximum exposure than the minimum settlement figure.

Written communication apparently plays an unimportant role in most cases. The "Agreement and Release" merely states the statutory basis for the claim, the forfeiture amount and any accompanying conditions. Case files typically contain no explanation for the forfeiture amount finally accepted. Files of closed cases are not prepared or filed in such a way as to be useful as precedents for future cases. One gets the impression that most "corporate memory" about the conditions justifying different forfeiture levels is stored within the participants' heads. As a reflection of this fact quantitative data on the ICC's forfeiture settlement process is very skimpy.

If an accused refuses to respond to a claim letter or is unwilling to settle on terms acceptable to the agency's negotiator, the only recourse customarily available has been to refer the case to the local United States Attorney for prosecution. Many agency officials feel that referral is virtually futile unless the case involves a large forfeiture and blantantly illegal conduct. These officials have the view—justifiably or not—that ICC forfeiture claims are too technical to appeal to juries and often too small to receive high priority from United States Attorneys. They claim that referred cases are either allowed to languish or settled for small amounts. In an effort to strengthen its bargaining position, the ICC has recently announced a policy of initiating license revocation or suspension proceedings against carriers who engage in 'inexcusable, prolonged and repeated failure to pay statutory forfeiture claims."[359] In effect this policy imposes a kind of "good faith negotiations" requirement on certificate holders.

The claimed authority for this approach is a provision in the regulations to implement the Federal Claims Collection Act jointly promulgated by the Attorney General and Comptroller General.[360] This provision urges agencies, as a means of collecting claims, to "give serious consideration to suspending or revoking licenses or other privileges." While this method of collection may be legitimate in some contexts, its use in this context raises serious questions. Failure of a licensee to negotiate settlement of a forfeiture claim can be viewed, not as an example or punishable contumacy, but as an exercise of the licensee's statutory right to a judicial determination of liability and the appropriate sanction. For whatever reason, Congress chose to preserve the opportunity for a jury trial rather than to confer adjudicatory jurisdiction on the agency. To suspend or revoke a license for refusing to settle a forfeiture case elevates the interest of administrative efficiency over the value of having one's case tried before a neutral adjudicator and a local nonprofessional fact-finding body. Whatever the wisdom of this assignment of relative values in the abstract, it appears to conflict with the choice made by Congress.[361]

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[359] *See, e.g.,* Shealy Trucking Co., Inc. ICC No. MC-C-10096, Investigation and Revocation of Certificates at 2, April 26, 1978.

[360] 4 C.F.R. § 102.6 (1978), *adopted by the ICC,* 49 C.F.R. § 1021.1 (1978).

[361] In defense of its policy, the agency claims to have used it in "but a few cases and only in the egregious circumstances." Letter, *supra* note 354, at 4. But the agency appears to consider an outright refusal to bargain as "egregious," rather than a mere exercise of a statutory right.

The necessity for strengthening the agency's bargaining position is not obvious. The agency has, since adopting the claims settlement approach, succeeded in settling the vast majority of its forfeiture actions, "it's easy to collect lots of money," as one ICC official put it. The troublesome question is whether it isn't too easy. The very fact that carriers have fairly readily settled forfeiture claims may of course, simply reflect the fact that carriers, like broadcasters[362] and, to a lesser extent perhaps, mine operators,[363] are reluctant to offend the agency to whom they owe their continuing existence. On the other hand, it may mean that they regard occasional modest forfeitures as a cost of doing nonetheless profitable illegal business. One gets the impression that illegal carrier operations and transactions are far more common than may be reflected by the ICC's forfeiture claims. Many violations are difficult to detect. Furthermore, the economic incentives to violate the Interstate Commerce Act are substantial. The gains from an unauthorized operation or an illegal rate defeat may go far beyond the gain in net revenues in the one case. The competitive advantage gained as a result may translate into substantial secondary benefits. In such a setting, a forfeiture policy predicated on willingness to settle may be inherently ineffectual,[364] especially if no conscientious effort is made to assure that the minimum settlement figure is a realistic multiple of economic benefits. These speculations must, unhappily, remain as such, since the ICC has made no effort systematically to assess the effectiveness of its enforcement program.[365] In fact, the Commission has not even made any systematic effort to follow up on its forfeiture cases to make sure that illegal conduct does not reoccur. In the absence of such studies, one can only speculate about the efficacy of the forfeiture settlement process.

IX. EVALUATIVE CRITERIA

As the preceding studies should illustrate, the process used by administrative agencies to administer a sanction like civil money penalties may vary widely from agency to agency. It may be shaped by a wide variety of contextual variables, political, statutory, organizational or financial. The process adopted by an agency may, of course, reflect forces wholly outside its control. To the extent, however, that a process is subject to change by an agency or by any other conscious actor, the questions arise: Does the process work well? Could it be improved? How?

In order to answer such questions, it is necessary to develop criteria for measuring and judging the performance of a process. Perhaps paramount among such criteria is effectiveness: a process is good if it advances the substantive objectives of a governmental program.[366] The imposition of civil monetary penalties can be thought to promote substantive governmental objectives in at least two ways. The most obvious and widely acknowledged method is by motivating future behavior.[367] The prospect of punishment, it may be hoped, will discourage conduct which the government wishes to discourage and encourage conduct which it wishes to encourage. The actual imposition of a penalty on one who has engaged in such conduct is necessary, presumably, to protect or enhance the credibility of that threat.[368] Motivation may be "general" or "specific" in its focus—that is, aimed generally at the universe of actors whose conduct the government may wish to influence, or more specifically at one or a small group of actors, such as those who have previously engaged in forbidden conduct.[369] If all lawbreakers had precisely the same knowledge and the same set of motivations as all other actual or potential lawbreakers, the distinction between the two would vanish. But that, of course, is not the case. A mild penalty may specifically secure compliance by an unusually law-abiding actor, when a more severe penalty would have been necessary to impress the universe of less compliant potential offenders.

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[362] *See* p. 264 *supra*.

[363] *See* p. 273 *supra*.

[364] *Cf.* Goldschmid, *supra* note 6 at 921–93.

[365] The ICC's Bureau of Operations does conduct routine industry compliance surveys to detect violations. But the agency has not tied this activity to an evaluation of enforcement efficacy. Letter, *supra* note 354, at 1–2.

The motivational function of legal sanctions is, of course more commonly referred to as "deterrence." Because of its association with criminal law,[370] however, the term "deterrence" has acquired in the minds of many a wholly prohibitory connotation not necessarily appropriate in the civil regulatory context. It is true that many civil penalty statutes are in substance, or at least in form, prohibitory. But much modern regulation—particularly dealing with environmental protection or human health and safety[371]—is essentially affirmative in operation. That is, it seeks to stimulate discrete forms of beneficial behavior more than to prevent isolated instances of harmful behavior. While the distinction between affirmative and negative injunctions may be artificial in concept or unmanageable in application, I have generally attempted to use terms—such as "motivation"—which avoid a bias in either direction.

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[366] Enumerations of normative criteria for evaluating administrative "procedures" abound, but the concept of substantive effectiveness is not usually among them. *See, e.g.,* Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va. L. Rev. 585, 592–93 (1972) ("accuracy," "efficiency," and "acceptability"); Michelman, *Formal and Associational Aims in Procedural Due Process,* in Due Process: Nomos XVIII 126 (J. Pennock & J. Chapman eds. 1977) ("accuracy," "revelation," and "participation"); Verkuil, *The Emerging Concept of Administrative Procedure,* 78 Colum. L. Rev. 258 (1978) ("fairness," "efficiency," "participant satisfaction"). While some or all of the values traditionally invoked (especially "accuracy") may be viewed as serving a "substantive effectiveness" objective, they are usually presented solely as primary values in their own right. This inattention to the substantive role of procedures has produced a reaction by a growing number of scholars. *E.g.,* Robinson & Gellhorn, *Perspectives on Administrative Law,* 75 Colum. L. Rev. 771 (1975). *See also* Breyer, Vermont Yankee *and the Courts' Role in the Nuclear Energy Controversy,* 91 Harv. L. Rev. 1833 (1978); Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle,* 72 Nw. L. Rev. 120 (1977).

[367] *See, e.g.,* National Independent Coal Operator's Ass'n v. Kleppe, 523 U.S. 388, 399 (1976) (purpose of mine safety penalties to provide "strong incentive for compliance with the mandatory health and safety standards"); United States v. ITT Continental Baking Co., 420 U.S. 223, 232 (1975) (Federal Trade Commission Act civil penalties designed to "provide a meaningful deterrence against violations").

[368] *See generally* F. Zimring & G. Hawkins, Deterrence 91–194 (1973).

[369] *See, generally* H. Packer, The Limits of the Criminal Sanction 39, 45–53 (1968).

[370] *See, generally* F. Zimring, Perspectives on Deterrence (1971).

A second function which might conceivably be served by a civil money penalty is compensation.[372] By definition, a civil money penalty does not serve a "specific" compensatory function of making whole an identifiable individual specifically injured by the offending conduct. That function, in our legal system, is performed by a system of private remedies, usually enforceable through the courts, but in some cases enforceable by administrative agencies.[373] Money penalties can, however, be utilized to serve a "general" compensation function—that is, to compensate "society" at large for harm which it has suffered at the hands of a violator. This method of compensation might be used in cases in which the harm, though suffered by individuals, is dispersed so widely that the cost of identifying the persons harmed and measuring their individual claims would be prohibitive. The penalty payment, credited to the public treasury, "reimburses" individuals in proportion to either their contribution to public revenues or their benefit from public expenditures. Alternatively, one might view the payment as compensation to the government for the costs incurred by it to enforce the substantive standard.[374]

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[371] Mandatory health and safety standards for coal mines are an illustration. *See* 30 C.F.R. §§ 11-36 (1977). *See also* OSHA health and safety standards, 20 C.F.R. §§ 1910.1-.1500 (1977), and EPA air pollution and water pollution abatement standards, 40 C.F.R. §§ 50-460 (1977).

[372] *See, e.g.*, Becker, *Crime and Punishment: An Economic Analysis*, 76 J. Pol. Econ. 169, 208 (1968) (speaking of "fines" generally); Comment, *The Use of Civil Penalties in Enforcing the Clean Water Act Amendments of 1977*, 12 U. San Francisco L. Rev. 437, 446 (1978). Courts have expressly acknowledged a compensatory objective of civil fines on rare occasions. *E.g.*, Helvering v. Mitchell, 303 U.S. 391, 401 (1938) (penalties under the revenue laws intended in part "to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud"); Stockwell v. United States, 13 Wall. (80 U.S.) 531, 547 (1871) (customs penalties considered "as providing indemnity [to the government] for loss").

[373] An example is the ICC's authority to award reparations against a carrier for overcharging a shipper. 49 U.S.C. § 305 (1976).

[374] *E.g.*, Helvering v. Mitchell, 303 U.S. 391, 401 (1938).

Retribution and restitution are two additional objectives sometimes invoked as justifications for legal sanctions,[375] but not particularly relevant to the present discussion. "Retribution," as a concept distinct from deterrence, is likely to be implicated only by offenses against society's most fundamental moral convictions. The conduct punishable by civil monetary penalties usually does not have that character.[376] Futhermore, preservation of the admittedly tenuous constitutional distinction between "civil" and "criminal" penalties evidently requires the exclusion of retributive rhetoric from the "civil" sphere.[377] The civil money penalty is, on the other hand, an obviously appropriate method of achieving a "restitutive" objective: that is, removing from a violator the benefit of his wrongdoing. But the concept of restitution overlaps so completely with the concepts of motivation, compensation and punishment, that its inclusion as an independent criterion will rarely serve any useful purpose.

The "compensatory" function of a civil money penalty necessarily overlaps with the "motivational" function. Knowledge that certain conduct may trigger a demand, backed by the state's coercive power, for payment of compensation is itself a powerful incentive not to engage in the conduct. The pursuit of a compensatory goal, then, must almost invariably imply the simultaneous pursuit of a motivational objective as well. This is not to say, however, that the specifications of objectives has no operational consequences for the design of a penalty-imposition process. The effectiveness of any particular process may depend in important ways on the mix of objectives it is supposed to serve. A process which is effective at motivating behavior may not be as effective at promoting compensatory goals. For one thing, the substantive standards used to govern the size of the penalty may be different. Motiviation may require a good deal larger penalty than one which merely compensates society for its injury. So, too, the procedures needed to apply those standards may be different. A compensatory goal may require a more elaborate procedure designed to identify and resolve factual disputes about the size of the injury, whereas a general deterrent function could be served adequately by a more mechanical approach to calculating the size of the penalty.

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[375] *See* Hart, *The Aims of the Criminal Law,* 23 Law & Contemp. Prob. 401, 402 (1958).

[376] *See, e.g.,* H. Packer, *supra* note 369 at 359; Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View,* 17 Stan. L. Rev. 197 (1965); Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations,* 30 U. Chi. L. Rev. 423 (1963).

[377] Helvering v. Mitchell, 303 U.S. 391, 397–402 (1938). *See also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); Trop v. Dulles, 356 U.S. 86, 95 (1958); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 548-52 (1943). On the insubstantiality of the "civil"—"criminal" distinction, and a proposal to strengthen it, see Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases,* 59 Cornell L. Rev. 478 (1974). *See also* Levin, *OSHA and the Sixth Amendment: When Is a "Civil" Penalty Criminal in Effect?* 5 Hastings Const. L.Q. 1013 (1978).

Whatever the objective, however, the "effectiveness" measure will typically subsume some secondary evaluative criteria, such as predictability, accuracy, consistency, expedition, economy and acceptability. In fact, these criteria embody independent values which should be advanced, at least to some degree by any system for the imposition of a governmental sanction.[378] That is, a regulatory process should make predictable the consequences of certain conduct and illuminate the procedures for determining those consequences. It must also strive to assure that like cases are treated in similar fashion and that the procedures followed involve no more delay or cost than necessary.

As the case studies and the foregoing discussion suggest, the penalty-imposition "process," as I have used the term, encompasses more than the "procedures" used by agencies to decide individual cases. It necessarily includes the development of, and content of, standards and rules applied in those cases, as well as methods used to review and evaluate agency performance. In principle, it should encompass all of the things agencies do, to use Professor Davis' terminology, to "confine," "structure," and "check" the exercise of their discretation in such cases,[379] including perhaps even the methods used to select, train and socialize decision-making personnel. While some of these elements lie beyond the scope of this project, they should all be kept in mind in formulating any prescription for change.

One largely self-imposed constraint on the scope of this undertaking has been to focus on the *agency's* process. The penalty-imposition process can, of course, and not infrequently does, implicate other entities, such as the Department of Justice, the courts, and Congress. A careful examination of the roles played by all of those actors would require a considerably more ambitious undertaking. But no study of the administrative penalty process can ignore the surrounding institutional context. In particular, one must keep in mind that only rarely may a federal agency collect a civil money penalty against the offender's will without recourse to a court, usually with the aid of the Justice Department.[380] What these actors can and will do thus provides an ever-present backdrop for any consideration of agency process.

X. PENALTY STANDARDS

An examination of the penalty-imposition process logically begins with the standards utilized by agencies to determine whether and in what amount to impose a monetary penalty. The effectiveness of a penalty system cannot be evaluated without examining the agency's standards, and no procedural system can be intelligently designed for imposing penalties without knowing what those substantive standards are. "Standards," as I have used the term here, encompass two subjects: (1) a definition of the primary conduct for which a penalty may be imposed, and (2) a statement of the rules or criteria by which the amount of the penalty will be calculated. An evaluation of standards in the first sense—standards of primary conduct—is beyond the scope of this project. That task requires a careful examination of the particular objectives of individual statutory schemes. The quality of substantive administrative standards, while undoubtedly subject to improvement, did not appear to be a conspicious problem in the case studies examined as part of this project. Applicable regulations define most forms of commonly penalized conduct with commendable clarity. It is with respect to standards of the second type—standards for determining the penalty amount—that this study was primarily concerned and the greatest room for improvement was identified.

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[378] *See* note 366 *supra.*

[379] K. Davis, Discretionary Justice: A preliminary Inquiry 54–55, 97–99, 142–43 (1969).

[380] *See* pp. 208–10 *supra.*

A. The Need for Penalty Standards

The proposition that persons charged with the determination of penalties should be guided by reasonably clear, complete and objective policies seems to obvious to warrant prolonged discussion. Others have made the case for standards so often and so forcefully as not to require repetition.[381] Yet the paucity of standards for determining the severity of sanctions—both in the present context and elsewhere[382]—gives one reason to wonder what attributes of the sanctioning process seem to convert that orthodoxy to heresy. Some may feel that standards of liability are much more important than remedial standards since the guilty are less deserving of protections afforded by standards than the innocent. But this view is at best an argument for relative allocations of regulatory effort, not for totally neglecting the formulation of penalty's standards.

Prevailing conceptions of justice certainly do not support a view that once a person has been found to have committed an offense his continuing interest in participation, accuracy of factfinding and consistency of decision deserves no further recognition at the sanctioning stage.[383] The lack of moral opprobrium attaching to most regulatory offenses[384] would make such a value judgment especially inappropriate in the civil penalty context. Finally, that attitude ignores the rather substantial interest which society itself has in the determination of penalties by reference to established standards. The efficacy of any regulatory program depends on the sanctions imposed in individual cases. If those sanctions are set too low, potential violators may be insufficiently motivated to minimize the social harm resulting from their behavior or society may be undercompensated for the harm that does occur. If they are set too high, resources may be misallocated in the opposite direction—behavior which produces a net social benefit will be discouraged.[385] Chronic errors in either direction can undermine the credibility and political acceptability of the regulatory program. The only basis upon which one can determine whether a particular penalty is "too low" or "too high" is by reference to a set of standards.

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[381] See generally K. Davis, supra note 379 at 52-96; K. Davis, Police Discretion, 112-20 (1975). *Cf.* T. Lowi, The End of Liberalism (1969). A particularly forceful judicial statement of the functions served by standards in the determination of civil money penalty amounts is Dickinson v. Davis, 277 Ore. 665, 561 P.2d 1019 (1977) (Linde, J.).

[382] *See, e.g.,* M. Frankel, Criminal Sentences: Law Without Order (1973) (criminal sentencing); Thomforde, *Patterns of Disparity in SEC Administrative Sanctioning* Practice, 42 Tenn. L. Rev. 465 (1975) (SEC license revocation and suspension).

[383] *See, e.g.,* authorities cited note 520 *infra* (criminal sentencing). *Cf.* Wolff v. McDonnell, 418 U.S. 539 (1974) (right of prisoner to due process hearing in disciplinary case); Morrissey v. Brewer, 408 U.S. 471 (1972) (right of prisoner to parole revocation hearing).

In a sense, of course, the argument for penalty standards is academic. The real issue is not whether standards should be formulated, but rather who should do so. A penalty scheme could hardly be administered at all unless the individual decisionmakers were applying some set of standards, however implicit, to the cases that came before them. Every decision to assess or mitigate a penalty, except those—hopefully rare—decisions inspired wholly by caprice, implies a standard which, in turn, implies a conception of regulatory purposes. If neither the legislature nor the agency formally establishes penalty standards, that function will devolve, by default, on individual agency employees responsible for processing assessments and mitigation requests. In the great majority of cases[386] governmental "policy" will consist solely of those personal standards.

Congressional action can, of course, avert the tyranny of multiple, invisible sets of penalty standards. But as indicated earlier,[387] Congress has rarely given administrative decisionmakers very useful guidance in setting penalty levels. Only about one-fourth of the variable-penalty statutes contain any criteria for the "assessment" of penalties; even these are little more than a laundry list of factors to be considered. Even less common are statutory guidelines for the exercise of a "mitigation" authority.[388] It lies within the capacity of Congress, of course, to fill this vacuum. But the orthodox view of Congressional delegation certainly does not counsel optimism on this score.[389] Here, as in so many other contexts, the search forsubstantive standards seems to lead inexorably to the agencies' doors.[390]

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[384] *See* note 376 *supra.*

[385] *See* R. Posner, An Economic Analysis of Law 358–59 (1972).

[386] As the case studies demonstrated, the majority of penalty cases are disposed of at a preliminary stage. *See* pp. 36, 52, 63, 73, 86 *supra.*

[387] *See* pp. 214–15 *supra.*

[388] *See* p. 217 *supra.*

[389] *See, e.g.,* Bruff & Gellhorn, *Constitutional Control of Administrative Regulation: A Study of Legislative Vetoes,* 90 Harv. L. Rev. 1369, 1372 (1977). *But cf.* Wright, *Beyond Discretionary Justice,* 81 Yale L.J. 575 (1972).

If it is true that Congress cannot be relied upon to provide missing penalty standards, it does not necessarily follow that that responsibility devolves primarily upon the regulatory agencies, as distinct from, say, the Justice Department or the courts. It may be conceded that a regulatory agency, whenever authorized to issue a binding order after a formal adjudication of liability, has an obligation to establish objective penalty standards to govern the penalty determination. But what of the more common case in which it has been given only an unadorned "assessment" authority, or the still more common case in which its only expressly delegated function is to "mitigate" or "compromise" a penalty? Such statutes, it may be argued, confer principal adjudicative authority—and, by implication, standard-setting responsibility—on the courts, not the agency.[391]

Even if one accepts the premises of that argument,[392] it does not follow that agencies have no significant standard-setting responsibility. Whatever, the assignment of de jure authority, agencies almost invariably exercise substantial de facto power. Even the ICC, given no express statutory role in the penalty-imposition process,[393] resolves most penalty cases without recourse to the Justice Department or the courts. In exercising that de facto power, the agency has no less interest in attempting to effectuate the statutory purpose than does a court adjudicating an enforcement claim. And the interest of the regulated party in participation, accuracy of fact-finding and consistency of treatment are no less than in a judicial forum.

An agency in the position of the ICC might respond, however, that it cannot establish meaningful standards because its adjudicative role is purely derivative. Its power is largely restricted to persuasion and negotiation. "Standards" based on ideal considerations of effectuating regulatory purposes must yield to the pragmatic reality of assessing the bargaining positions of the two parties. The agency is constrained in what it may demand by factors beyond its control—by the likelihood of convincing a United

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[390] *See generally,* Davis, *A New Approach to Delegation,* 36 U. Chi. L. Rev. 713 (1969).

[391] Courts are, of course, accustomed to fashioning standards for the severity of sanctions—including civil money penalties—without explicit legislative or regulatory guidance. *See, e.g.,* J.B. Williams v. FTC, 498 F.2d 414, 438 (2d Cir. 1974) (civil penalty for violation of § 7 of the Clayton Act "should be based on a number of factors including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay"). *Accord,* United States v. Papercraft Corp. 540 F.2d 131 (3d Cir. 1976).

[392] I have argued later that a power to "assess"—and perhaps even to "mitigate"—penalties may be interpreted as a sufficient delegation of adjudicatory power to the agency as to give its fact findings at least presumptive weight in a judicial enforcement action. *See* pp. 327–29 *infra.*

[393] *See* p. 277 *supra.*

States Attorney to prosecute and a jury to convict, by the amounts that the prosecutor is likely to settle for or the court to award, by the costs of further proceedings and the strength of the evidence. In this context, the pragmatist might insist, niceties premised on an adjudicative ideal must give way to the hard realities of bargaining power.

This position—evidently held by some regulatory officials—may have some implications for the *content* of administrative penalty standards, but it is hardly an acceptable justification for failing to articulate standards altogether. In the first place, its implication that "effectiveness" criteria are not relevant in the pre-adjudicatory setting is plainly wrong. When an agency attempts to compromise a penalty claim—regardless of the source of its authority—it should not permit itself to ignore underlying regulatory objectives. If a mitigation requested or a compromise offered by the violator is acceptable to the agency, it is acceptable presumably only because payment of that particular sum furthers statutory goals, not simply because the violator is willing to pay it. Without having first articulated those goals and translated them into operative standards, the agency can never make that judgment.

Second, by establishing standards for assessing or compromising penalties recoverable in a civil action, the agency may well be able to influence the courts in the exercise of their penalty-setting discretion. A penalty structure developed and articulated by the agency responsible for the initiation of enforcement action can make a legitimate claim to at least some deference by a judge. On this assumption, for example, the EPA has proceeded to develop a highly detailed policy for calculating proposed air and water pollution penalties even though these penalties may be collected only in a de novo civil action and the agency has no express statutory assessment authority.[394]

Third, there is some value in establishing penalty assessment standards even in "pure bargaining" settings simply because the presence of such standards should reduce the transaction costs to the agency of negotiating a large number of cases.[395] Finally, the establishment of standards is necessary to facilitate oversight of the penalty negotiation process by agency management, the Executive, Congress, and the general public.[396] The utility of standards for this purpose is especially great in a decentralized penalty negotiation process. Regulatory agencies cannot, in short, escape a responsibility to articulate penalty standards, no matter how minimal the role conferred upon them by the enabling statute, so long as they possess de facto power to institute and terminate penalty claims.[397]

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[394] Discussed at pp. 299–300 *infra.*

[395] On the tendency of interest negotiation to coalesce around "adjudicative" norms, see Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rule-Making,* 89 Harv. L. Rev. 637 (1976). *Cf.* G. Allison, Essence of Decision: Explaining the Cuban Missile Crisis 169–71 (1971).

[396] One rather emphatic statement of this "political accountability" justification for administrative standards may be found in Sun-Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Com'n, 16 Ore. App. 63, 71, 517 P.2d 289, 294 (Ct. App. Ore. 1973). *See also* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971).

B. *Feasibility of Articulating Penalty Standards*

It is all well and good, the skeptic may answer, to say as a matter of principle that agencies should adopt penalty standards, but can it be done in practice? Can an agency hope to anticipate all of the factors that ought properly to bear on a sanctioning decision? Can an agency draft a set of standards which really confine discretion without destryoing the capacity to do justice? This often rhetorical inquiry cannot be brushed aside. Experience with attempts to structure prosecutorial discretion[398] and judicial sentencing policy[399] counsels extreme caution in expecting dramatic results. The very fact that so few agencies have established penalty standards[400] raises doubts about their ability to do so. Nevertheless, I would conclude from the instant survey that there is in fact room for significant improvement in administrative standards.

At a minimum, agencies could simply enumerate the factors that influence the determination of penalty amounts and the direction of that influence. One may protest that this step is either totally unnecessary or totally ineffectual—unnecessary because any intelligent person can guess what are the factors properly bearing on determination of a penalty, ineffectual because a typically vague and open-ended enumeration can exert no real constraint on arbitrariness. These arguments, I believe, grossly exaggerate. In some cases agencies are not necessarily influenced by every imaginable factor. Enumeration of factors saves time and effort by implicitly excluding factors not relevant to the determination. Furthermore, the very discipline of preparing an official list of decisional factors helps focus agency policy. It can help policymakers to identify and eliminate overlap and ambiguity in such commonly used terms as "size of violator" and "gravity."[401] It can encourage policymakers to operationalize their general concepts by indicating how such factors as "size" and "ability to pay" should be measured.

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[397] This is not to imply that the character of that role may not be relevant for other purposes. For example, it is probably relevant in determining the extent to which the standard-setting "obligation" posited in the text might be judicially enforceable. A penalty imposed under an explicit "assessment" authority will usually be accorded at least some deference by a court in a subsequent enforcement action, but only to the extent that the reviewing court finds that the agency has reasons for the assessment rationally related to the statutory objective. *See, e.g.,* Butz v. Glover Livestock Com'n Co., 411 U.S. 182, *reh. denied,* 412 U.S. 933 (1973); Beck v. SEC, 430 F.2d 673 (6th Cir. 1970); United States v. General Motors Corp., 417 F. Supp. 933 (D.D.C. 1976). In that sense, at least, a court may require an agency to articulate "standards" under an "assessment" statute.

[398] *See, e.g.,* Lockhart, *Discretionary Clemency: Mercy at the Prosecutor's Option,* 1976 Utah L. Rev. 55; McClintock, *The Unreviewable Power of the General Counsel of the NLRB: Partial Enforcement of the Labor Act,* 12 Gonz. L. Rev. 79 (1976).

[399] *See, e.g.,* Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing,* 126 U. Pa. L. Rev. 550 (1978). *See generally,* P. O'Donnell, M. Churgin & D. Curtis, Toward a Just and Effective Sentencing System: Agenda for Legislative Reform (1977).

[400] *See* p. 221 *supra.*

Standards can go beyond an enumeration of factors and provide some guidance about the relationship among them or the relative weights to be assigned to them. For example, a body of standards could specify whether any particular factor—such as fault—is a precondition for assessing a penalty, how to compute the minimally acceptable penalty in any given case, or what regulatory violations will be treated as most serious. At the highest level of detail, of course an agency could specify a mathematical formula, such as the MSHA "regular assessment" formula,[402] for combining the various factors or a simple schedule of fixed penalties, such as the FCC's citizen band penalties.[403]

1. Regulatory Purpose

In order to frame a set of standards for determining the penalty amount appropriate for an individual violation, one must first identify the purpose or purposes the penalty is intended to serve. As noted earlier,[404] money penalties may serve one of at least two conceptually distinct purposes: motivation of behavior and compensation for harm to society. While these objectives overlap to a considerable degree, a penalty optimally suited to achieve one may not necessarily be best suited to the other. Consequently, it may be important to determine which of these purposes are at work in a particular context and, at least roughly, the relative weights assigned to each.

Penalty statutes rarely give explicit guidance on this score. If such guidance is available at all, it must usually be deduced inferentially. When a statute enumerates criteria to be considered in assessing a penalty, the choice of criteria may be illuminating. For example, a statute that requires the agency to determine the "economic benefit"[405] of noncompliance evinces a statutory purpose to motivate behavior by removing any unjust enrichment. Inclusion of "culpability"[406] or a similar factor[407] obviously connotes a deterrent objective.

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[401] On the ambiguity of these terms, see p. 294 *infra.*

[402] *See* pp. 226–27 *supra.*

[403] *See* p. 267 *supra.*

[404] *See* pp. 283–87 *supra.*

[405] *E.g.,* 42 U.S.C. § 7420 (Supp. 1972) (violation of emission control standards by stationary air pollution source).

[406] *E.g.,* 15 U.S.C. § 1990b (1976) (failure to report information about motor vehicle accident losses); 15 U.S.C. § 2615 (1976) (toxic substance controls); 16 U.S.C. § 1858 (1976) (fishery conservation).

[407] "Good faith" is another term commonly used to suggest degree of culpability. *E.g.,* 7

(Continued)

Unfortunately, many criteria commonly cited in penalty statutes could support two or more possible interpretations. Consider, for example, a requirement that the penalty reflect the "size" of the offender.[408] The word "size" may be shorthand for "ability to pay"—thus recognizing a common assumption of deterrence theory that the motivational effect of a penalty depends on how much it hurts the particular offender. On the other hand, inclusion of the criterion may reflect a legislative view that the violator's "scale of operations" is a useful indicator of the social harm caused by his conduct—thus implying a compensatory objective. "Gravity"[409] of the offense may be used in the sense of the perceived gravity to those others whose conduct must be deterred or the actual gravity as a measure of the harm for which "compensation" must be paid to society.

In some cases other statutory language may provide useful guidance. For example, a provision that sums collected will go into a special fund to be "applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties"[410] may imply a compensatory purpose. Or the presence in the statute of an alternative remedy for compensating society for the harm caused by a violation—such as a civil action to recover costs of removing an oil spill[411]—may suggest that the money penalty is designed solely for deterrence.

If agencies, or their employees, have formulated operational definitions of the purposes served by civil money penalties, they have not done so with noticeable clarity. It seems fair to conclude that employees of all agencies studied operated on the assumption that motivation was the principal, if not the exclusive function of its civil penalties.[412] But I encountered no agency policy statements expressly indicating the role, if any, played by non-motivational objectives. At best, one must decipher the relationship among potential objectives from the official standards promulgated by, or the de facto standards used by, the agency to determine actual dollar amounts. For example, the Coast Guard's former directive on assessing oil

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U.S.C. § 2149 (1976) (illegal sale of animals); 16 U.S.C. § 668(b) (1976) (protection of bald and golden eagles).

[408] *See, e.g.,* 7 U.S.C. § 1361 (1976) (illegal use of pesticides); 15 U.S.C. § 2069 (1976) (consumer product safety); 46 U.S.C. § 1484 (1976) (boating safety).

[409] *See, e.g.,* 15 U.S.C. § 1825 (1976) (horse protection); 29 U.S.C. § 666(a) (1976) (occupational safety and health); 33 U.S.C. § 1322 (Supp. 1977) (marine sanitation devices).

[410] 29 U.S.C. § 216(e) (Supp. 1977) (child labor laws).

[411] 33 U.S.C. § 1321(f) (1976).

[412] *See, e.g.,* 43 F.R. 23515 (1978) (MSHA rules). A particularly clear statement of the motivational objectives of a penalty scheme is contained in EPA, Memorandum from Assistant Administrator for Enforcement to Regional Administrators, Enforcement Against Major Source Violators of Air and Water Acts, April 11, 1978, *reprinted in* 6 Pollution Control Guide para. 49,050 (1978).

spill penalties strongly implied that such penalites should serve a deterrent rather than compensatory function.[413] But if that is the message, the agency could certainly communicate it with much greater clarity. Likewise, the detailed "regular assessment" formula used by MSHA implies the relative weights assigned by the agency to possible purposes.[414]

Since the factors are additive, one might infer that motivation has less weight than it would in a multiplicative formula where a finding of "gross negligence" would substantially increase the penalty over the amount assessable for mere negligence. But, once again, the message is ambiguous, especially in view of the agency's use of a wholly separate discretionary "special assessment" procedure in some cases.[415]

2. *Motivational Impact*

Once one has identified the mix of purposes to be served by a penalty, one must establish criteria for determining the precise dollar amount which will best promote those purposes in any given case. This is, of course, an extremely inexact art, since it requires some understanding of the factors that motivate a large group of diverse, frequently corporate actors.[416] Any attempt to construct a system of effective inducements must involve a great deal of guesswork. But in most agencies it has apparently involved little else. When asked point blank how effectively their existing penalties deter unlawful conduct, most agency officials responded: "I don't know." None of the agencies surveyed had made any really systematic effort to ascertain the motivational impact of their penalties, and few had made even an informal analysis.

There is, of course, considerable literature on deterrence,[417] and if it proves anything, perhaps it is that few really useful generalizations have been demonstrated. There is some evidence to suggest that severity of punishment is not an important deterrant; that it is the perceived certainty

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411. 33 U.S.C. § 1321(f) (1976).

412. *See, e.g.,* 43 F.R. 23515 (1978) (MSHA rules). A particularly clear statement of the motivational objectives of a penalty scheme is contained in EPA, Memorandum from Assistant Administrator for Enforcement to Regional Administrators, Enforcement Against Major Source Violators of Air and Water Acts, April 11, 1978, *reprinted in* 6 Pollution Control Guide para. 49,050 (1978).

413. U.S.C.G., Commandant Instruction 5922.11B at 8-9 (1974). *See* pp. 245-46 *supra.*

414. 30 C.F.R. § 100.3, *as inserted by* 43 F.R. 23519 (1978). *See* pp. 226-227 *supra.*

415. 30 C.F.R. § 100.4, *as inserted by* 43 F.R. 23519 (1978). *See* p. 228 *supra.*

416. On the difficult problem of influencing corporate behavior through the use of negative sanctions, see, e.g., C. Stone, Where the Law Ends 39-40 (1975); Mueller, *Mens Rea and the Corporation,* 19 U. Pitt. L. Rev. 21 (1957). *See also* Olds, Unkovic & Lewin, *Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Clean Water Acts,* 17 Duquesne L. Rev. 1 (1978).

417. *See generally* F. Zimring, *supra* note 370; F. Zimring & G. Hawkins, *supra* note 368; Schwartz & Orleans, *On Legal Sanctions,* 34 U. Chi. L. Rev. 274 (1967).

of punishment that carries the greatest motivational force.[418] On the other hand, most studies acknowledge that the relative and absolute motivational importance of severity and certainty depends on the context.[419] It seems to matter whether one is talking about crimes against the person or crimes against property, major or minor crimes, personal or business crimes. The social, cultural and economic context is relevant.[420] The relationship between severity and certainty, even in a limited setting, may not be simple. Severity may have more motivational force when the certainty of punishment exceeds some threshold value.[421] Other variables, such as the type of punishment may be more important than the severity of a particular punishment.[422]

To the extent that the deterrence literature supports a presumption that certainty of punishment outweighs severity of punishment in importance, agencies may be justified in spending more time worrying about investigative and prosecutorial procedures than penalty standards. But the applicability of the general literature on criminal deterrence to the very specialized subject of economic or "white collar" crime is highly questionable. The little empirical research that has been done on the subject suggests that severity of punishment is important in deterring economic crime,[423] a conclusion powerfully reinforced by economic theory.[424] Regulation of the sort punishable by civil fines is typically addressed to the adverse consequences, or "social costs," of private productive activity.[425] Oil spills, black lung disease, and degradation of the quality of broadcasting services are examples of the kinds of social costs that private productive activity can generate. It is precisely because the marketplace has no effective means of forcing producers to internalize these costs that regulation is thought necessary.

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[418] *See, e.g.,* Bankeston & Cramer, *Toward a Macro-Sociological Interpretation of General Deterrence,* 12 Criminology 251 (1974); Geerken & Gove, *Deterrence: Some Theoretical Considerations,* 9 L. & Soc'y Rev. 497 (1978). *See also* Bailey & Smith, *Punishment: Its Severity and Certainty,* 63 J. Crim. L., Criminology & Police Sci. 530 (1972).

[419] *See, e.g.,* Chimos & Waldo, *Punishment and Crime: An Examination of Some Empirical Evidence,* 18 Social Problems 200 (1970); Silberman, *Toward a Theory of Criminal Deterrence,* 41 Am. Soc. Rev. 442 (1976).

[420] *See, e.g.,* Phillips & Votey, *An Economic Analysis of the Deterrent Effect of Law Enforcement on Criminal Activity,* 63 J. Crim. L., Criminology & Police Sci. 330 (1972).

[421] *Cf.* Tittle & Rowe, *Certainty of Arrest and Crime Rates: A Further Test of the Deterrence of Hypothesis,* 52 Social Forces 455 (1974).

[422] *See, e.g.,* M. Clinard, The Black Market 243–45 (1952) (businessmen fear imprisonment more than financial sanctions).

[423] *See, e.g.,* Lane, *Why Business Men Violate the Law,* 44 J. Crim. L., Criminology & Police Sci. 151 (1953); Stotland, *White Collar Criminals,* 33 J. Social Issues 179 (1977). *Cf.* Sjoquist, *Property Crime and Economic Behavior,* 63 Am. Econ. Rev. 439 (1973).

[424] *See generally* R. Posner, *supra* note 385 at 357–73; Becker, *supra* note 372; Stigler, *The Optimum Enforcement of Laws,* 78 J. Pol. Econ. 526 (1970).

[425] *See generally* Coase, *The Problem of Social Cost,* 3 J.L. & Econ. 1 (1960).

Regulation, then, is addressed to one of the most assumedly rational of human activities—the calculation of cost and revenue by a productive economic entity. The penalty for violating a regulation serves as a surrogate "cost" of production—a way to internalize an otherwise external social cost.[426] As such, its severity becomes as much a part of the rational calculus of the producer as any other cost. Although the classical model of economic rationality has undergone a good deal of theoretical and empirical reexamination and modification,[427] its fundamental precepts remain relatively intact. Its condition is certainly robust enough to cast serious doubt on any assertion that the severity of a regulatory fine has no significant motivational impact.

Many agencies have the means to estimate the motivational effects of their penalty structures. Even in the absence of reliable economic or psychological models of motivation in so complex a setting, experience is a useful guide. What effect does the institution or change of a penalty system have on the rate of compliance? Is recidivism common? Do the undeterred violations fit a particular pattern? An agency that prosecutes only a handful of violations per year may find those questions difficult to answer. But when an agency prosecutes hundreds or thousands of violations, the information generated by those cases can be a powerful tool for evaluating the effectiveness of its enforcement effort. By gathering and storing relevant information from those cases in such a way as to facilitate its analysis, the agency can begin to identify changes in the rate of various types of violations, isolate characteristics of violators, and estimate the impact of changes in the level or frequency of penalty assessments on the rate of compliance.

Some of the information necessary to perform this review requires special agency investigation or audit. Agencies should conduct compliance surveys of at least a random sample of recent violators to see whether they have corrected the offending condition or repeated the offense.[428] But the penalty administration process itself generates most of the information needed to perform an effectiveness review. The problem is to make usable information already in agency files. For large penalty-processing operations, this probably requires a computer-based information system. Of the agencies surveyed, the two with the largest caseloads—MSHA and the Coast Guard—each had a computer-based case file containing a wealth of information useful for program evaluation purposes.[429]

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[426] This theory has been thoroughly developed in the field of environmental pollution. *See generally* M. Edel, Economics and the Environment (1973); L. Hines, Environmental Issues: Population, Pollution & Economics (1973).

[427] *See, e.g.,* R. Cyret & J. March, A Behavioral Theory of the Firm (1963); O. Williamson, The Economics of Discretionary Behavior: Managerial Objectives in a Theory of the Firm (1964). *But see* Alchian, *The Basis of Some Recent Advances in the Theory of Management of the Firm,* 14 J. Ind. Econ. 30 (1965).

[428] My investigation suggests that relatively few federal agencies conduct systematic compliance surveys of the type suggested. The closest approximation among the agencies studied is MSHA, which conducts a reinspection at the end of the abatement period. *See* pp. 230–31 *supra.* Of course, MSHA periodically inspects all mines so frequently that it probably has no need for a special reinspection of recent violators. Other agencies, while conceding the value of compliance reinspection, plead inadequacy of resources.

The lack of systematic penalty impact studies does not mean that agencies ignore the issue. The FCC's Safety Bureau, for example, showed a commendable sensitivity to the issue in its 1963 memorandum to the Commission explaining the reasons for its proposed ship forfeiture schedule.[430] In that memorandum the Bureau computed forfeiture rates (number of vessels incurring forfeitures as a percentage of number inspected), and recidivism rates for each type of ship forfeiture during the previous year. Based upon the fact that these rates were extremely low, as well as qualitative judgment that violations rarely resulted from willfulness, the Bureau recommended a schedule of very small first-offense forfeitures. A later memorandum concluded that no change in the policy was warranted, since non-compliance and recidivism rates remained low.[431] In rather sharp contrast to this stands the decision of MSHA to overhaul its "regular assessment" formula so as to double average assessments in 1978,[432] without the kind of systematic analysis of violation and recidivism rates, by type of violation and violator, which should be readily possible given its data base.

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[429] For example, MSHA's "Assessment Data Base Management System" collects the following data on every violation assessed: the mine in which the violation occurred, the date on which the violation notice was issued, the type of citation, the mandatory health or safety standard violated, the penalty points assessed for each assessment criterion, the total points assessed and the dollar amount assessed. MSHA, Description of the Assessment Data Base Management System (Draft March 17, 1978). Since MSHA inspects all mines on a frequent periodic basis, it should be able to utilize this data, as well as centrally stored data on the ownership, status and type of mine, to determine rates of violations by type of violation, assessment criterion, and operator/controller. Any category showing a particularly high rate of violation or a pronounced increase in the rate of violations would be a logical candidate for an increase in penalty amounts. Unfortunately, at the time research for this study was conducted, neither MSHA's nor the Coast Guard's systems were capable of more than data retrieval on individual cases. More recently, however, the capacity of both systems has improved.

[430] Memorandum, *supra* note 340 at 3.

[431] Memorandum, *supra* note 320 at 1.

[432] 43 Fed. Reg. 23514 (1978), *amending* 30 C.F.R. Part 100. In its statement of the basis and purpose for the changes, MSHA did utilize quantitative data drawn from its previous enforcement experience to explain two changes in the size of point ranges allocated to explain two changes in the size of point ranges allocated for "negligence" and "good faith," 43 Fed. Reg. 223515-16, but not to explain its general elevation of the conversion table. In its defense, it should be said that MSHA had been severely criticized on a number of occasions for the low level of its penalties. *See, e.g.,* Hearings on S. 717, Before the Subcom. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 335 (1977) (statement of Arnold Miller, President, United Mine Workers of America); Hearings Before the Subcom. On Labor of the Senate Comm. on Labor and Public Welfare, 91st Cong., 2d Sess. 195 (1970) (statement of W.A. "Tony" Boyle, President, UMWA). Also, as indicated earlier, at the time the penalty schedule was amended, MSHA's information system did not have the capability of producing the analysis suggested in the text. In the statement of basis and purposes, MSHA notes that its proposed formula is not "perfect," and promises to review the formula "once there has been some experience under this system." 43 Fed. Reg. 23516 (1978).

3. *Removal of Economic Benefit*

Some agencies may argue, with varying degrees of conviction, that they lack the resources or the data base to conduct a systematic study of the impact of their penalty structure compliance patterns. Even these agencies, however, are not left totally at the mercy of unsupported guesswork in framing a sensible penalty structure. Since most regulatory offenses punishable by administrative fines involve the adverse social consequences of private productive activity,[433] removal of the benefit realized from noncompliance could be posited as a minimal condition for motivational adequacy. A good example of a standard based on this premise is the formula developed by the Environmental Protection Agency to assess penalties for failure to comply with air and water pollution abatement orders.[434] The most important single element in the formula is a calculation of the "economic benefit" realized by the violator.[435] The EPA has developed a complex formula for estimating economic benefit, which calculates the present value to the polluter of the stream of savings resulting from refusal to make required modifications in operating processes or to install required equipment.[436] Both capital and operating cost savings are included. The sophistication of this system stands in marked contrast to the ICC's crude efforts to estimate the benefit of unauthorized operations.[437]

That very sophistication, however, sharply limits its utility as a model for other agencies. Despite the use of computer-based algorithms and published averages for certain parameters in the equation,[438] the formula nevertheless imposes a heavy factfinding burden on EPA staff. Application of the formula requires information on a large number of paramenters specific to the pollution source[439] or the particular pollution-abatement requirement violated,[440] usually covering a period of years. Acquisition of such information

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[433] *See* pp. 296–97 *supra.*

[434] EPA, Civil Penalty Policy For Application of Section 309(d) of the Clean Water Act and Section 113(b) of the Clean Air Act to Certain Water Act Violators and Air Act Stationary Source Violators, April 11, 1978, *reproduced in* 6 Pollution Control Guide para. 49,050 (1978).

[435] *Id.* at 13–14. "Economic benefit" will also be the basis of administratively-imposed mandatory penalties assessed under section 120 of the Clean Air Act, 42 U.S.C. § 7420 (Supp. 1977), effective July 1, 1979. *See* EPA, Proposed Rules, 44 Fed. Reg. 17310 (1979).

[436] EPA, Technical Support Document for the Civil Penalty Policy, September 1978.

[437] *See* pp. 279–80 *supra.*

[438] For example, "annual inflation rate of pollution control equipment," "interest rate on source's long-term debt," and "useful life of pollution control equipment." EPA, Technical Support Document, *supra* note 436, at 10, 11 & 13.

[439] For example, its marginal tax rate, rate of return of equity, capital structure, and income tax depreciation method. *Id.* at 10–13.

[440] For example, the original capital expenditure that should have been made for required pollution control equipment, the annual operating and maintenance expenses that would have

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can impose significant investigative costs and provide the basis for factual disputes between the agency and the polluter. Only in a regulatory scheme in which the typical case involves very high stakes is such a system feasible.

This does not mean, however, that the principle of restitution has utility only under those conditions. There are many contexts involving relatively small penalties in which agencies can make tolerably reliable estimates of illegal benefit at little cost. The ICC, for example, could use standardized ratios to translate the "gross revenues" of an unauthorized operation into a reliable estimate of the net revenues received as a result. As part of its ratemaking function, the ICC routinely computes the ratios of average and marginal costs to revenues from trucking operations.[441] Penalty assessment personnel could utilize such pre-existing ratios in individual cases without great loss of accuracy.[442]

Mere removal of economic benefit will usually be insufficient by itself to secure compliance with regulatory standards. It is necessary, at least in theory,[443] to multiply the documented benefit by a factor representing the likelihood of escaping punishment altogether. (The inverse of the risk of punishment.) Suppose a firm realizes a profit of $1,000 from an activity which, on average, is detected and punished only ten percent of the time. If the only cost of being apprehended were the penalty and if the firm were behaving rationally, a $10,000 penalty would presumably be necessary to deter that conduct. Since there are other costs associated with being apprehended—such as legal fees, adverse publicity, or greater exposure to closer scrutiny in the future—a somewhat smaller penalty may prove to be adequate. Precisely measuring these other costs, as well as the risk of detection, is probably an impossible task and, in any event, would be prohibitively expensive in individual cases. Nonetheless, an agency could make a reasoned estimate of such factors and combine them into a simple multiple which would be applied to all economic benefit calculations. If, however, the agency concluded that the probability and non-penalty costs of detection were incapable of estimation or motivationally irrelevant, it could limit itself to recovering only the unlawful profits documented in the case at hand.

4. Compensation

Translating the "compensation" objective into operational standards

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been incurred in connection with such equipment, and the period of delayed compliance. *Id.* at 8, 9, 13.

[441] *See, e.g.,* Middle West General Increases, 48 M.C.C. 541 (ICC, Div. 3, 1948); ICC, Bureau of Accounts, Cost Finding and Valuation, Statement No. 4–59 (1959). *See generally* 2 A. Kahn, The Economics of Regulation 54–56 (1971); Goodman, *Recent Trends in Transport Rate Regulation,* 70 Mich. L. Rev. 1225, 1249–1256 (1972).

[442] Other things being equal, the agency should probably use a ratio based on marginal (or "variable" or "out-of-pocket") cost rather than average (or "fully distributed") cost. In the short run, at least, it is presumably the excess of incremental revenue over out-of-pocket costs that provides the incentive to use existing equipment in an illegal operation.

[443] *See, e.g.,* R. Posner, *supra* note 376 at 360.

presents another set of difficulties. Since, by hypothesis, money penalties serve a general, as distinct from specific, compensatory function, one must, in theory, measure the nonspecific "social" harm caused by an illegal activity. The EPA, for example, directs its regional penalty assessment officers to consider "the harm or risk of harm to public health or the environment" caused by unlawful air and water pollution.[444] But the lack of specificity of the guideline reflects the difficulty of that task.[445] EPA regional officials confirm that impression and note that, largely as a result, the "harm" factor does not significantly affect most penalty calculations.

MSHA's penalty formula makes a commendable effort to isolate and measure the elements of the "harm" calculation. The formula separtely assigns points for three such elements: the probability that an offending condition will cause actual harm, the number of persons exposed, and the severity of the harm likely to be experienced by the average exposed person.[446] While this approach necessarily involves essentially arbitrary assignments of values, it has the salutory effect of directing enforcement officials' attention to the individual elements by which total harm might be determined. This approach seems well-suited to cases where the "harm" is potential, rather than actual, damage or injury. MSHA's approach in the latter context is more problematical. Where a death or serious injury has actually occurred, the agency replaces the formula with a more discretionary approach that assesses much higher penalties.[447] Since these harms are "specific" harms that can be, and presumably are, compensated directly,[448] it is not clear what regulatory purpose—other than pure retribution—is served by imposing a penalty more severe than if the same act of noncompliance had not actually caused a serious injury. MSHA presumes that serious injury implies grossest negligence on the mine operator's part, but it offers no empirical support for that presumption.

In cases in which measurement of social harm is particularly difficult in principle or expensive in practice, the agency might adopt as a substitute the concept of compensating the government for its enforcement efforts.[449] The sums appropriated by Congress or expended by an agency for controlling a particular type of conduct might be taken as a very crude proxy for a more direct measure of the social harm caused by that conduct.[450] Using that principle, an agency might structure its penalties so as to recover the government's overall related costs of regulation. It would still be necessary, of course, to develop a standard for allocating this aggregate sum among individual violators. Presumably some measure of the scale of violations would have to be developed for this purpose—for example, the quantity of oil illegally spilled, the revenues from unauthorized operations, or the percentage in excess of authorized power output. While it may be difficult in some contexts to develop easily administered measures of the relative scale of violations, the undertaking will usually be considerably easier than attempting directly to calculate social harm.

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[444] EPA Memorandum, *supra* note 412 at 12–13.

[445] *See* R. Posner, *supra* note 385 at 160. Some economists have tackled the ambitious task of developing methods to measure environmental harm. *See, e.g.*, M. Clawson, the Economics of Outdoor Recreation (1966); J. Dales, Pollution, Property and Prices (1968); D. Henderson, The Uncertain Search for Environmental Quality (1974); Pearse, *Toward a Theory of Multiple Use: The Case of Recreation Versus Agriculture*, 9 Nat. Resources J. 561 (1969).

[446] 30 C.F.R. § 100.3(e), *as inserted by* 43 Fed. Reg. 23518 (1978).

[447] *See* p. 228 *supra*.

[448] These losses can be compensated under a state workmen's compensation act, or in a common law tort action.

[449] The Supreme Court has expressly recognized compensation of the government for its enforcement expenses as a legitimate objective of money penalties. Helvering v. Mitchell, 303 U.S. 391, 401 (1938); Stockwell v. United States, 13 Wall. (80 U.S.) 531, 547 (1871).

Attempting to recover enforcement costs through the penalty system may seem objectionable as a disguised tax. Agencies have been rebuffed in their attempts to set regulatory fees on that basis.[451] But a fee serves a very different function from a penalty. A fee, according to the Supreme Court, is a means by which the government obtains reimbursement for rendering a specific service.[452] Consequently, the fee must be commensurate with an identifiable and measurable benefit conferred on the fee payer. A penalty, by contrast, may be used as one means to force a violator to compensate society for harm inflicted upon it. The cost, to society, of a program designed to prevent that harm may reasonably be taken as an estimate of that harm in the absence of more accurate measures.

5. *Ability to Pay*

The principle that a penalty otherwise appropriate should be adjusted to fit the financial circumstances of the violator is widely acknowledged. Statutory enumerations of penalty criteria frequently include a reference to ability to pay,[453] as do some administrative standards.[454] Unfortunately, the concept of "ability to pay" is pregnant with a degree of ambiguity that invites arbitrary and capricious application. A set of administrative penalty standards which fails to resolve that ambiguity thus leaves a dangerous gap.[455]

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[450] It is a "proxy" rather than a "measure," because it is the social harm *prevented* by regulation—not the harm which occurs *despite* regulation—which presumably sets the limit on what society is willing to expend on regulation. There is no necessary relationship between the value of the harm prevented by regulation and the harm occurring despite regulation. The "cost of regulation" approach, then, is justified not so much by logic as by expedience.

[451] National Cable Television Ass'n v. United States, 415 U.S. 336 (1974); FPC v. New England Power Co., 415 U.S. 345 (1974); National Ass'n of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976); Capital Cities Communications v. FCC, 554 F.2d 1135 (D.C. Cir. 1976).

[452] National Cable Television Ass'n v. United States, 415 U.S. 336, 340–41 (1974). The decision was based on an interpretation of the language of the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a (1976), but has more general application because the Court based its strict interpretation of the statute on constitutional considerations. 415 U.S. at 340–42.

[453] *See, e.g.,* 15 U.S.C. § 1825 (1976) (horse protection); 15 U.S.C. § 1990b (1976) (motor vehicle reporting requirements); 16 U.S.C. § 1858 (1976) (fishery conservation).

[454] *See, e.g.,* EPA, Civil Penalty Policy, *supra* note 434 at 22. *Cf.* 4 C.F.R. § 103.2 (1978) (standards for "compromising" claims under Federal Claims Collection Act).

The term "ability to pay", as used in the context of monetary penalties, may have one of at least three distinct meanings. First, it can invoke the common assumption of deterrence theory that the motivational impact of a sanction depends on the subjective pain it inflicts on the wrongdoer. In most forms of "economic" offenses, the violator's "penalty tolerance" will presumably be a direct function of the net benefits realized from the illegal conduct. Application of "restitution" principles advanced earlier,[456] then, will adequately dispose of "ability to pay" considerations in this first, or "motivational" sense.

A second, and colloquially more common, meaning focuses on the practical ability of the government to collect the debt. In the extreme version of this interpretation, a violator is "unable to pay" a penalty only in the event that he posses insufficient assets for distribution to holders of equally or more senior obligations in the event of bankruptcy. This strict definition of "inability to pay" has the great advantage of minimizing the number of cases in which the defense would be successful, or indeed even offered. Its very draconian character suggests, however, that "ability to pay" may—or should—include consideration of values not reflected in either of the first two interpretations discussed. These values include concern about the welfare of the violator either for his own sake or for the sake of those dependent on him.

A penalty, otherwise appropriate in view of the benefit realized by the violator and the adequacy of his assets to insure collection, might impose so much hardship on the violator or, secondarily, on others as to warrant its reduction. In the common case of a corporate entity, this point may be reached, for example, when the penalty literally forces the business to shut down, causing secondary unemployment and economic dislocation. It is presumably for this reason that several statutes require the agency, when assessing a penalty, to consider its effect on the ability of the violator to remain in business.[457]

Even in the absence of specific guidance, it is undoubtedly appropriate for agencies to weigh that factor in the balance. Any effort to do so, unfortunately, confronts decisionmakers with formidable difficulties. In the first place, predicting the impact of a penalty on ability to continue in business requires intensive financial analysis that will add considerably to the cost of the penalty calculation. Second, it may be extremely difficult to separate the adverse effect of the *penalty* from the adverse effect of other compliance costs.[458] Third, balancing the "social cost" of closing down a business against the social cost of continued non-compliance involves an unavoidably high degree of subjectivity.

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[455] *See, e.g.*, the MSHA standards, 30 C.F.R. § 100.3, *as inserted by* 43 Fed. Reg. 23517-19 (1978).

[456] *See* pp. 299-300 *supra*.

[457] *See, e.g.*, 7 U.S.C. § 13a (1976) (commodity futures contract market); 7 U.S.C. § 1361 (1976) (manufaturer or user of pesticides); 15 U.S.C. § 2615 (1976) (manufacturer or distributor of toxic substances); 46 U.S.C. § 170 (1976) (transporter of explosives).

In the face of these difficulties, agencies would be well-advised either to exclude "ability to pay," in the third sense, from the penalty calculation, or at least to limit its applicability to a narrow class of cases in which the costs of compliance are so great as to threaten the continued economic viability of a significant minority of firms. In any event, agencies should specify in their penalty standards whether decisionmakers should consider ability to pay in this third sense,[459] and, if so, what financial indicators or elements ought properly to be considered in its application.

6. Costs and Risks of Collection

The discussion to this point has focused on substantive criteria for determining an "ideal" penalty amount in the abstract. But, of course, penalty determinations are made, not in the abstract, but in concrete procedural contexts. Agency officials empowered to "assess," "mitigate," or "compromise" penalites exercise their powers within the constraints imposed by the enforcement process itself. The process is costly—it requires an investment of staff and financial resources invariably in limited supply. It is risky—each successive stage exposes prior determinations to an uncertain prospect of modification or reversal. Persons entrusted with making decisions at any point short of the ultimate adjudicative stage will inevitably feel the influence of these factors. A set of standards to guide their action cannot, therefore, be complete without explicitly addressing the question of whether and to what extent they may enter into penalty determinations.

Litigative probability and collection costs are factors plainly related to the efficiency and effectiveness of the agency's enforcement program. Reduction of a penalty otherwise appropriate may well be justified by savings in future collection costs or the avoidance of a significant risk of failure. But agencies should exercise great care in incorporating such calculations in the penalty determination. Assessing litigative probabilities requires a prediction about the behavior of persons performing prosecutorial and factfinding functions, whose interests, views, and motives may be only vaguely familiar to agency officials authorized to mitigate or compromise penalties. Predicting the outcome of litigation before a court is particularly hazardous, since the fate of the case rests in the hands of often unknown United States Attorneys, jurors and district judges. Agency officials can presumably predict the outcome of an administrative adjudication with greater confidence. But, as the case studies indicate, the percentage of penalty cases which reach adjudication is infinitesimal.[460] The behavior of even a known prosecutor or factfinder will often be difficult to predict.

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[458] It is not so much the prospect of paying a particular penalty, as the prospect of incurring substantial compliance costs (or liability for a succession of future penalties for noncompliance), that might precipitate a business closing.

[459] The EPA's standards specify that "serious economic hardship" may justify reducing a penalty, but not relaxing the obligation to come into compliance. EPA, Civil Penalty Policy, *supra* note 434 at 22-23. But, unless the EPA has another means of coercing compliance, it cannot have it both ways. Alleviation of penalty amounts in "hardship" cases has the *effect* of a relaxation of the compliance obligation in those cases.

In spite of this uncertainty, one might argue that significant variations in litigative probablity should be reflected, however crudely, in compromise calculations. This assumes, of course, that agencies do, and should, prosecute cases having a probability of success significantly less than unity. The case studies do not indicate that such a practice is widespread. The agencies studied rarely proceeded without a virtually iron-clad case. And, in view of the severe limitations on their enforcement resources, that policy seems wise. Only in a narrow category of actions involving major violations whose punishment would carry substantial precedential or public relations value does it make sense to prosecute a doubtful case. For this reason, agencies' penalty standards should probably limit the use of the ''litigative probabilities'' factor to that narrow category of cases.

Authorizing settlement of a penalty claim on the basis of ''collection costs'' is also hazardous. It is understandable, of course, that the prospect of saving further enforcement expenses may induce an agency official to accept a penalty lower than the ideal. But, procedural cost is a two-edged sword. The desire to save the expense of further litigation generates in the two parties a symmetrical motivation: to the government, a willingness to settle for less than the probable adjudicatory result; to the violator, a willingness to settle for more. An agency sensitive to the realities of bargaining position should therefore exercise restraint in its willingness to discount its demand by a factor representing litigation savings. In theory, agency negotiators should consider this factor only to the extent that the ''utility'' to the government of saving litigation costs exceed the utility of the accused of its probable cost savings. Except in extreme cases, estimating those quantities involves such guesswork that an agency would be justified in altogether excluding the ''cost saving'' factor from its calculus.[461]

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[460] *See, e.g.*, pp. 39, 63, *supra*.

[461] The EPA—the only agency I encountered with detailed written settlement standards—does not include ''litigation costs'' in its settlement criteria, presumably for this reason. EPA, Civil Penalty Policy, *supra* note 434 at 10–12.

C. Disclosure of Standards

One important question concerning the formulation of penalty standards is the extent to which they should be revealed to the public. There is, of course, a strong bias in administrative law, reinforced by the Freedom of Information Act,[462] in favor of public disclosure of administrative policy. Indeed, the central function served by penalties—motivation of behavior—implies public disclosure. Potential offenders cannot conform their conduct to the desired standard unless they have some idea of the consequences of nonconformity. Disclosure of the standards used to calculate penalties seems necessary to accomplish that result.[463]

Yet, the issue of disclosing penalty standards is not without its difficulties. Some agency officials are noticeably reluctant to reveal to the public the standards used by their agency to set civil money penalties. The case against revelation is premised on one of three arguments: that revelation dilutes the deterrent value of the sanction, weakens the bargaining position of the agency in settling penalty claims, or reduces the efficiency of the enforcement process.

The belief that the deterrent value of a sanction will be undermined if potential violators can accurately estimate its severity is hard to dismiss out of hand because it is fairly widely held and is not obviously implausible.[464] The argument for the deterrent value of secrecy assumes that potential offenders have a strong aversion to risk. That is, they will tend to resolve a situation of uncertainty about the penalty likely to be imposed by assuming either the maximum possible penalty or at least a more severe penalty than will in fact be imposed. If, on the other hand, potential offenders were risk accepters and tended to undervalue the risk in the face of uncertainty,[465] secrecy would produce a counterproductive result.[466] It is not intuitively obvious that the risk-aversion hypothesis is a more accurate description of reality at least in any given setting.[467] Broadcasters, for example, may be more risk-averse than, say, citizen band operators. But in the absence of some empirical evidence, it seems a dubious proposition to base public policy on either hypothesis.

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[462] 5 U.S.C. § 552 (1976). Indeed, FOIA probably requires the disclosure, and perhaps even publication in the Federal Register, of the kinds of standards discussed in the text. *See* 5 U.S.C. § 552(a)(1)(D) (1976). To the extent that this is so, opponents of public disclosure might cite FOIA as an additional reason for not articulating standards in the first place. In view of the substantial justification for administrative articulation of penalty standards, even apart from any value inhering in their public disclosure (see pp. 288–92 *supra*), such an argument appears rather anemic. Furthermore, to the extent that the case against revelation rests on solid policy grounds, memoranda containing such standards could plausibly be exempted from disclosure as, for example, "internal personnel rules." 5 U.S.C. § 552(b)(2) (1976).

[463] For this reason I disagree with a statement by Judge Linde in Dickinson v. Davis, 277 Ore. 665, 673, 561 P.2d 1019, 1023 (1977) that the "importance" of standards for mitigation "is not to give notice to potential violators." A potential violator who overestimates the administrator's probable leniency will be insufficiently deterred. It is probably true, however, that overestimation of leniency is less likely than underestimation. For that reason, the "motivational" argument for disclosure of "mitigation" standards is weaker than for disclosure of "assessment" standards.

[464] *See, e.g.*, Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 Colum. L. Rev. 1293, 1297 (1973). *Cf.* Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L. A.L. Rev. 1, 29 (1971) (impact of disclosing prosecutorial policies on deterrence).

The incremental deterrent value of uncertainty about the penalty amount depends, of course, on the degree to which other consequences of a violation can be predicted. The severity of the sanction is but one of several elements in the calculation. The "cost" of committing an offense is also a function of the likelihood of detection, the likely strength of the evidence, the cost of defending an enforcement action, the adverse publicity attending prosecution, the enhanced exposure of the offender to closer agency scrutiny in the future, and the cost of correcting the offending condition. Since civil monetary penalties are often only one of an arsenal of possible sanctions which the government might invoke,[468] the calculations must assess the probabilty and attendant costs of each. Most of these elements in the calculation are extremely uncertain. The agency can, to be sure, reduce this uncertainty by better articulation of its overall enforcement policy.[469] And, as I suggested earlier,[470] an "ideal" deterrent penalty formula would contain a factor reflecting the costs and risks of detection. But these steps would necessarily leave a significant residue of uncertainty in the potential offender's cost-benefit calculation. If the potential offender is risk-averse, he may be deterred far more effectively by an exaggerated estimate of those non-penalty costs than by an exaggerated estimate of the penalty amount.

Finally, of course, uncertainty has utility as a deterrent only to the extent that the actual prospective penalty is too low, by itself, adequately to deter. The "ideal" penalty is, by definition, one which is large enough to induce compliance. If the penalties actually imposed by the agency fail to have that effect, it would seem preferable to raise the penalties in fact rather than relying on secrecy to create a false impression of enhanced severity.

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[465] Professor Vorenberg thinks that this is precisely the effect of uncertainty in the criminal law. Vorenberg, *Narrowing the Discretion of Criminal Justice Officials,* 1976 Duke L.J. 651, 664.

[466] As the deterrence literature suggests, there may be some contexts in which perceived severity of the penalty has little deterrent effect. *See* page 296 *supra*. This might be true, for example, where the cost of further precaution against possible liability is greatly in excess of even the maximum possible penalty. In that setting, secrecy has no incremental deterrent impact.

[467] Corporations are generally assumed to be risk-neutral. R. Posner, Antitrust Law: An Economic Perspective 223–24 n. 4 (1976).

[468] *See* p. 220 *supra*.

[469] *See* p. 333 *infra*.

[470] *See* p. 300 *supra*.

A second possible basis for a reluctance to reveal standards for penalty determination is the view that secrecy enhances the agency's bargaining position in negotiating settlement. In "conflict" bargaining situations, so the argument goes, knowledge is power. The object of each party is to obtain as much knowledge about the other's position while concealing as much as possible about its own position.[471] Revelation transforms a party's minimum position into a maximum position: the other party will never agree to settle for more, and may well be able to hold out for less. If an agency publicizes its standards for setting penalties, it effectively tells the world what its minimum position is.

Even if revelation of standards reduces the agency's chances of settling at a figure above its "minimum," it is not obvious that the public interest will suffer as a result. If the agency has correctly applied well-designed penalty standards, its "minimum" figure will presumably represent an amount which properly balances the competing values at work in the statutory scheme. If collection of an amount in excess of that minimum will produce a net gain to society, the "minimum" has, in effect, been incorrectly computed and should be raised. Exacting a larger penalty from a particular offender may, for example, produce some incremental increase in motivating compliance, but perhaps at a greater cost in curtailment of socially useful economic activity.[472]

The claim that premature revelation of the agency's "bottom line" figure would undermine enforcement effectiveness, even if true, however, is not a justification for complete secrecy. Surely the agency can reveal most of the significant elements of its penalty determination process without enabling a respondent to chart its bargaining strategy with mathematical precision. The agency can frame its standards in such a way as to leave sufficient play in the joints to protect its bargaining position. As mechanical as the MSHA "regular assessment" formula appears, for example, it leaves to agency personnel considerable room for discretionary judgments about such issues as the "gravity" of the violation and the "culpability" and "good faith" of the violator.[473] To the extent that agency negotiators consider such factors as ability to pay, litigative probabilities, and collection costs in arriving at a minimal settlement value, a violator is not likely to guess correctly how they assess those imponderables.[474]

A final argument against revelation of standards is that it will drive up the cost of resolving individual penalty cases. Anything that reduces the efficiency of the adjudicative process, it may be claimed, weakens regulatory effectiveness by reducing the number of enforcement actions that can be processed within a given budget. This argument is difficult to answer in the abstract because the impact of revelation on adjudicative cost undoubtedly depends on the context. One important variable is the content of the standard itself. A standard specifying a mechanical schedule of penalties, such as the FCC's schedule for common CB radio offenses,[475] will have little effect on processing costs because it leaves the accused little to argue about.

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[471] *Cf.* T. Schelling, *supra* note 358 at 175.

[472] *See* p. 289 *supra*.

[473] *See* pp.227–28 *supra*.

[474] Indeed, it is precisely because of their indeterminate nature that I have urged agencies to limit their use. *See* pp. 304–05 *supra*.

The asserted link between nondisclosure and adjudicative efficiency seems most plausible in the more common case of qualitative standards whose application may turn on disputable questions of observatism, credibility or inference. But it is not obvious that the publication of such standards will, by itself, produce a significant net increase in adjudicative cost. As the case studies indicate,[476] the amount at stake significantly constrains the propensity of an accused to contest a penalty claim. The fact that accused violators pay the vast majority of claims with little or no contest, despite the presence of published liability standards and the availability of elaborate formal procedures, suggests that publication of penalty standards is unlikely to precipitate any material increase in adjudicative costs. The efficiency of the MSHA system—with its highly detailed published penalty standards[477]—should dispel visions of administrative paralysis.

Indeed, it seems at least equally plausible that disclosure of standards will have the opposite effect. Published or otherwise publicly available standards enable the accused to focus his energies on only those factual or interpretive issues relevant to the decision, rather than wasting his time on the scattershot argument necessary to defend against unrevealed objections. Revelation of standards saves the violator the effort of having to feel out the agency officials with whom he is dealing and discourages any inclination to engage in a protracted bargaining process. Finally, there is evidence, from the MSHA case study[478] and elsewhere,[479] to suggest that persons who feel that they have been judged by objective and reasonable standards are less likely to challenge the result than those who do not. Publicizing decisional criteria is often an indispensable step towards developing that trust.

The general case, then, for suppressing publication of penalty standards is not particularly convincing. Even in those limited contexts where it is, there are additional countervailing arguments for revelation. Revelation tends to reduce the disparities which inevitably arise in a system of secret law between those who have access to or the ability to decipher the rules and those who do not. It enhances accuracy by giving respondents some indication of the factors which will govern their case and to which they should address their arguments. And, finally, it enhances the overall quality of decision-making by facilitating the self-correction of official erors. In a system of mass administrative justice, often conducted at a highly decentralized level, internal quality control may be a more expensive and less effective substitute.

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[475] *See* p. 267 *supra*.

[476] *See, e.g.*, pp. 239, 251, 260 *supra*.

[477] *See* pp. 227- 2828 *supra*.

[478] *See* pp. 239- 41–42 *supra*.

[479] Abraham Sofaer reached this same conclusion in his study of change-of-status determinations by the Immigration and Naturalization Service. Sofaer *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process,* 1 J. Legal Studies 349, 421 (1972).

D. Manner of Formulating Standards

In this section I have argued that agencies administering civil penalty statutes, even those assigning no explicit adjudicative role to the agency, should establish standards for determining penalty amounts in individual cases. It remains to be considered by what method agencies should formulate those standards and what form they should take.

Students and practitioners of administration are accustomed to view this question as involving a choice between two modal extremes: "rulemaking" and "adjudication."[480] Policy may be formulated, in other words, either by explicit abstract statement of policy to govern future cases, or by the emergence of general principles from a series of individual decisions. This is not the place to review the debate about the relative merits of rulemaking and adjudication as methods of establishing policy.[481] Since any process of adjudicating individual cases inevitably contributes to the formulation and modification of policy, the issue in most contexts is whether the agency should rely more heavily on rulemaking in striking the proper balance between the two. Most empirical studies of adjudication, including several sponsored by the Administrative Conference,[482] have concluded that rulemaking should be utilized to a greater degree.

The justification for rulemaking seems especially strong in most contexts involving money penalty adjudications. Very few agency decisions generate the kind of thoroughgoing analysis and written discussion of issues necessary for an effectively functioning "common law" system. The number of cases decided at the highest levels of the agency is often too small to be an effective vehicle for articulating a comprehensive body of decisional standards. The vast majority of money penalty cases terminate at a relatively early stage in the formal process and at a relatively low level in the agency. Few progress beyond the first or second official level. Regional penalty assessment officers and relatively junior central administrators resolve most cases. Review of decisions is usually perfunctory. Formal administrative appeals beyond the first fact-finding level are rare. And rarest still is a hearing on the record at any stage of the administrative review. Although the precedential value of such predominantly low-level decisions can and should be enhanced,[483] the potential of the adjudicatory process as a means of formulating agency policy in this context is, in short, inherently limited.

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[480] *See* Verkuil, *supra* note 366 at 363.

[481] *See generally* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. Pa. L. Rev. 485 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 Harv. L. Rev. 921 (1965).

[482] *See, e.g.,* Morgan, *Towards a New Strategy for Ratemaking,* 1978 U. Ill. L. Forum 21 (reduction of delay in ratemaking); Sofaer, *supra* note 479 at 382–93. *See also* Thomforde, *supra* note 382.

To suggest that agencies should rely more heavily on "rulemaking", however, is not a complete prescription. In the generic, nontechnical sense used to this point, "rulemaking" is not a single identifiable mode of decisionmaking, but rather a whole range of methods available to an agency to give general prospective guidance to decisionmakers or the public. Policy may be expressed in "legislative rules" promulgated after notice-and-comment procedures, "interpretive" rules or general statements of policy, staff manuals, internal memoranda, interpretive rulings or a host of other forms.[484]

One important dimension in the choice of methods is the form and degree of public participation involved in the formulation of a policy. While it is always desirable to obtain some measure of public input into the making of general policy,[485] the case for broad public participation in the formulation of penalty standards is not as strong as the case for input into substantive regulatory standards. Primary standards define the forms of conduct that expose an actor to legal liability in the first instance. Penalty standards merely help to calibrate the adverse consequences—usually only some part of the adverse consequences[486] that may follow from liability. Regulatory standards, moreover, often involve fundamental choices among competing values not highly constrained by statutory language. Penalty amounts, by contrast, are almost always at least constrained by a statutory maximum.[487] And the range of value choices is typically narrower. All penalties presumably serve a motivational objective.[488] The only important value choices concern the extent to which that objective should be accommodated to the values of compensating society[489] or preventing economic dislocation.[490]

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[483] *See* pp. 345–50 *infra.*

[484] *See* Davis, *supra* note 379 at 102–103.

[485] *See generally* Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process,* 60 Geo. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings,* 81 Yale L.J. 359 (1972).

[486] *See* p. 307 *supra.*

[487] For the rare exceptions, see note 55 *supra.*

[488] *See* pp. 284–85 *supra.*

[489] *See* p. 285 *supra.*

[490] *See* pp. 303–04 *supra.*

The case for broad public participation is less cogent, also, in those contexts in which it is the judiciary, not the agency, which has final fact-finding responsibility. Since any penalty standards promulgated by the agency in such a case could be "binding" only at the preliminary (administrative) but not the final (judicial) adjudicative stage, any accused person dissatisfied with the standards applied to his case by the agency has an opportunity to propose his own standards to a court.[491] By contrast, public participation in formulating administrative penalty standards is most justified to the extent that they do bind the ultimate decisionmakers.

The classical model of public participation—notice-and-comment rulemaking under section 4 of the APA[492]—seems most appropriate, then, when the agency has final adjudicative authority, and especially when its penalty standards reflect significant value choices. In other cases, the balance of costs and benefits would justify a lower level of public participation. For example, the agency could promulgate its standards without prior public input, but explicitly invite public comment on them with a view to their possible revision.[493] Or it could seek comment on a more selective basis from those most directly affected.

Agencies also have choices with respect to the form their penalty standards might take—whether prescriptive rules, enumerations of decisional factors, or illustrative or hypothetical cases. The MSHA standards illustrate the way in which these methods can be used in combination.[494] MSHA uses "prescriptive" rules to identify: (1) the factors which must be considered in assessing a penalty, (2) in the case of some factors, the quantities by which the factor must be measured, (3) the range of possible weights assignable to each factor, and (4) the method to be used to convert weights to a penalty amount. MSHA supplements the rules with instructions to staff containing interpretive guidelines and illustrative cases. The use of mechanical rules is obviously most suited to factors such as "size of business" and "prior history," since both factors may be measured with tolerable accuracy by simple quantitative indicators readily available or computable from agency files. Interpretive guidance and illustrative cases necessarily play a much larger role in the application of criteria such as "negligence" and "good faith," which can be "measured" acceptably only by eyewitness observation and subjective judgment.

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[491] Penalty standards evolved by courts in enforcement actions also become practical constraints on the content of any set of standards the agency may wish to establish to govern its own prehearing assessment or mitigation actions. These constraints further reduce the value of or need for public participation in their formulation.

[492] 5 U.S.C. § 553 (1976).

[493] Compare Michael Asimow's proposed procedure for adopting "interpretive" agency rules of general applicability. Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements,* 73 Nw. L. Rev. 108 (1978). This report is the basis for Recommendation 76-5 of the Administrative Conference, 1 C.F.R. § 305.76-5 (1978).

[494] *See* 30 C.F.R. § 100.3, *as amended by* 43 Fed. Reg. 23517 (1978), discussed at pp. 226-28 *supra.*

As a means of structuring discretion, the MSHA standards have their weaknesses, however. In the first place, they provide very little guidance for quantifying the "ability to pay" factor. The precision of the method used to treat the first five variables could be undermined by sloppy application of the sixth. More troublesome is the "special assessment" loophole. The agency's published rules impose no restrictions on the use of the "special assessment" method. In theory, any penalty case, however mundane, could be pulled out of the regular assessment process and assessed on any basis that the agency chose. It is true that the violator has a right to adjudicate a penalty claim before a MSHRC ALJ. But adjudication cannot correct an excess of prosecutorial leniency. And, given the costs of litigation, it cannot always correct even excesses of prosecutorial severity. If the regular assessment formula needs a safety valve for special cases, one would suppose that the agency could define the scope of that safety valve with greater precision. So large a reservoir of unrestricted discretion to deviate from standard operating procedures discredits an otherwise commendable effort at specificity.

This is not to say that a mathematical formula is necessary or even wise in all contexts. Standardized penalties seem most appropriate for the most frequent and relatively least severe penalties. The FCC's "price list" of penalties for citizen band offenses is a good example. Schedules of fines for illegal parking are another. As the penalty increases in complexity, the factors bearing on the determination of an appropriate sanction tend to multiply to the point that no mathematical formula can encompass them all. But that fact should not intimidate agencies into a total retreat from the use of standards. They can still state with some specificity the factors that govern their decisions and provide at least some degree of guidance on how those factors should be weighed and measured. The efforts of MSHA and the FCC's Safety Bureau stand as two illustrations, however flawed, of the value of the attempt.

XI. OPPORTUNITY FOR AN EVIDENTIARY HEARING

Before considering the "informal" aspects of an administrative process for collecting civil money penalties, it is useful to consider what "formal" procedural rights the accused may possess: that is, whether, at what stage, and in what form an evidentiary hearing is available. The availability of a trial-type hearing inevitably influences the design of preliminary procedures for the initial assessment and mitigation of penalties. In order to delineate the contours of an opportunity for evidentiary hearing, one must answer at least the following questions: (1) Is a trial required at some stage? (2) If so, what is the scope of the required hearing? (3) Under what circumstances must the evidentiary hearing be conducted by the agency itself?

(4) Are there circumstances under which the agency *should* conduct a trial, though not required to do so by law?

A. Is an Evidentiary Hearing Required at Some Stage?

May the state impose upon a person, and collect from him, a civil money penalty without at some stage affording him a right to a trial of disputed issues? Most civil money penalty statutes provide a clear negative answer. All 207 court-assessment statutes provide, explicitly or implicitly, for collection in a "civil action."[495] Enforcement actions brought under those statutes are thus presumably governed by the general procedural rules governing civil proceedings in federal district courts, including, of course, the right to be represented by counsel, adequate notice of the charges, an opportunity to present testamentary and documentary evidence, and to confront and rebut the government's evidence, including the right to cross-examine its witnesses, a neutral fact-finder (usually a jury), and a written decision based solely on the evidence on the record of the trial.[496] Of the 141 agency-assessment statutes, moreover, 27 require an administrative hearing based on section 5 of the APA.[497] That procedure generally accords the respondent the same rights previously enumerated, except that the trial is conducted before an ALJ or member of the agency rather than a judge and jury.[498]

There are, however, a number of civil penalty statutes which do not unambiguously require an evidentiary hearing at some stage. Some agency-assessment statutes contain no procedural requirements. Others—such as those requiring an undefined "hearing"—are at least susceptible to varying interpretations.[499] In this context, it may be important to refer to the constitutional dimensions of the issue, if only as an aid in statutory interpretation.

Does the Constitution require an evidentiary hearing before a civil monetary penalty may be exacted? The instinctive answer is a decisive "Yes." The due process clauses of the Fifth and Fourteenth Amendments forbid the government to "deprive" any person of his "property" without "due process of law."[500] It could not be more obvious that the collection, by coercion if necessary, of a money penalty is a "deprivation" of "property." As the Supreme Court has said, "the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.''[501] If they ''extend beyond'' them, they surely include them.[502]

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[495] *See* notes 34 and 35 and accompanying text *supra.*

[496] *See generally* Fed. R. Civ. Proc.

[497] *See* note 47 *supra.*

[498] 5 U.S.C. § § 556–557 (1976).

[499] *See* pp. 319–24 *infra.*

[500] U.S. Const. Amends. V, XIV.

A somewhat more arresting question is whether a full scale evidentiary trial is the ''process'' that is invariably ''due'' in the civil money penalty context. The ''civil'' designation has been interpreted by the courts to permit relaxation of many constitutionally mandated procedural attributes of the criminal ''trial,'' such as the right to a jury trial,[503] the requirement of proof ''beyond a reasonable doubt,''[504] the prohibition against double jeopardy,[505] and the right to appointed counsel.[506] Perhaps even some of the features characteristic of the civil judicial trial may be omitted in selected instances. The chief basis for any such speculation lies in the three part balancing tests enunciated in *Mathews v. Eldridge.*[507] In order to decide whether due process requires any particular procedural ingredient, one must balance the weight of the private interest at stake, the weight of the government's interest in excluding that procedure, and the incremental effect of requiring that procedure on the reliability of the factfinding process.[508] Applying the *Eldridge* criteria religiously, one could make a case for dispensing with, say, the right to confront and cross-examine witnesses in a penalty scheme involving small, average or maximum penalties (hence, not a very weighty individual interest to be protected), a large caseload (hence, a weighty governmental interest in economy and expedition), and a primary standard of conduct susceptible to objective assessment by direct observation or quantitative measurement (hence, little reliability gain from the proposed procedures). A paradigmatic illustration might be a system for enforcing municipal parking regulations.[509] Of the case studies examined in this report, the mine safety and citizen band radio programs best illustrate such a model.

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[501] Board of Regents v. Roth, 408 U.S. 564, 571–72 (1972).

[502] The Court has so held squarely in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (wages); *cf.* Fuentes v. Shevin, 407 U.S. 67 (1972) (possessory interest in chattels held a ''property'' interest).

[503] *E.g.*, Helvering v. Mitchell, 303 U.S. 391, 402 (1938); Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200, 1204–06 (3d Cir. 1975), *aff'd sub nom.* Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977); Olshausen v. Commissioner, 273 F.2d 23 (9th Cir.), *cert. denied,* 363 U.S. 820 (1960). *See also* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (jury not required in juvenile delinquency proceeding).

[504] *See, e.g.*, One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232 (1972) (forfeiture of smuggled goods); Compton v. United States, 377 F.2d 408, 411 (8th Cir. 1967) (forfeiture of vehicle involved in transporting liquor in violation of revenue laws); United States v. Garrett, 296 F. Supp. 1302 (N.D. Ga.), *aff'd* 418 F.2d 1250 (5th Cir. 1969), *cert. denied* 399 U.S. 927 (1970) (civil money penalty under Federal Aviation Act).

[505] Helvering v. Mitchell, 303 U.S. 391, 397–98 (1938); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).

[506] Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (termination of public assistance); United States v. Heljenek, 275 F. Supp. 579 (E.D. Pa. 1967) (selective service hearing); United States v. Zimmerman, 94 F. Supp. 22 (E.D. Pa. 1950) (deportation hearing). *See also* Gagnon v. Scarpelli, 411 U.S. 778 (1978) (probation revocation hearing). *But cf.* In re Gault, 387 U.S. 1 (1967) (right to appointed counsel in juvenile delinquency proceedings).

[507] 424 U.S. 319 (1976).

[508] *Id.* at 334–35.

Nevertheless, one can have little confidence that even under these restrictive circumstances, the Supreme Court would countenance anything less than a full-scale trial-type hearing of a civil penalty case, at least at some stage. Most of the recent due process decisions upholding less than a full trial have concerned cases in which a full-scale trial was available at a later stage.[510] The question was one of the timing, rather than the availability, of a trial.[511] Each case involved a protected interest (such as a subsidy or a job) that an adminstrative officer had a de facto ability to take away from its "owner." Since an administrative officer cannot usually compel the surrender of a money penalty without resort to a court, the question of "timing" does not arise as an issue separate from availability of a trial.

There are some statutes, to be sure, that authorize an agency forcibly to "collect" a penalty, by offsetting a proposed penalty against sums owed the alleged violator, or seizing and holding property of the alleged violator.[512] These situations do present a "timing" issue. The courts have usually upheld statutes permitting summary seizure of property,[513] but all of these statutes have provided for a full post-seizure evidentiary hearing. The tradition of requirng a trial before finally imposing any kind of penalty—civil or criminal—seems far too well-ensconced in our jurisprudence to yield to the

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509. Several jurisdictions have experimented with noncriminal approaches to traffic law enforcement. All of the experiments to date, however, preserve the right to a full evidentiary hearing at some stage of the process. *See* Carrow & Reese, *State Problems of Mass Adjudicative Justice: The Administrative Adjudication of Traffic Violations—A Case Study,* 28 Ad. L. Rev. 223 (1976).

510. *E.g.,* Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Dixon v. Love, 431 U.S. 105 (1977); Mathews v. Eldridge, 424 U.S. 319 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974). *See also* Ingraham v. Wright, 430 U.S. 651 (1977) (relying on availability of subsequent tort action.)

511. The Court has found less than a full evidentiary hearing adequate to protect conceded "property" or "liberty" interests in two cases in which a subsequent evidentiary hearing was apparently unavailable. Board of Curators v. Horowitz, 98 S. Ct. 948 (1978), and Goss v. Lopez, 419 U.S. 565 (1975). These cases involved the peculiar problems of assessing performance and maintaining discipline in educational institutions. These institutional constraints are not found in the regulatory schemes enforced by civil money penalties.

512. *See, e.g.,* 8 U.S.C. § 1229 (1976) (detention of aircraft for violation of immigration laws); 19 U.S.C. § 1592 (1976) (detention of vessel for violation of customs laws); 15 U.S.C. § 1948 (1976) (offset); 42 U.S.C. § 263k (1976) (same).

513 *E.g.,* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (vessel containing contraband); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (misbranded food); Phillips v. Commissioner, 283 U.S. 589 (1931) (property of delinquent taxpayer); Aircrane, Inc. v. Butterfield, 369 F. Supp. 598 (E.D. Pa. 1974) (aircraft violating Federal Aviation Act).

the apparent expediency of an *Eldridge*-type interest balancing. Due process procedures may be dispensed with in individual cases in which they can be shown to be useless.[514] But the Court would not approve a procedure that categorically withholds any important element of procedural due process from an entire class of money penalty cases.

B. What Is the Scope of the Hearing?

A second question concerns the scope of any required evidentiary hearing. The imposition of a sanction may present two kinds of issues: those bearing on the question of liability and those related to the determination of the proper sanction. A right to an evidentiary hearing, whatever its source, must encompass the former. But do accused violators have a right to an evidentiary hearing on the sanctioning issue? A few "agency-hearing" statutes provide an unambiguously affirmative answer to this question.[515] But the vast majority do not.

The Supreme Court has held that, in a civil action to enforce a "court-assessment" penalty, the determination of the penalty amount is a function for the court, not the jury.[516] This result accords with the traditional view that the imposition of a penalty is an "exercise of discretionary grant of power,"[517] not a finding of fact. But the exercise of even a concededly discretionary judgment presumably rests on some sort of factual predicate. Often the hearing on the issue of liability will provide that factual predicate. There may be cases, however, in which the penalty calculation depends on issues—such as the "size," "ability to pay," or "prior history" of the violator—not directly relevant to the liability determination. Without an opportunity to know and to meet the evidence on which the decisionmaker relies in making such judgments, the respondent may be unfairly penalized.

The counterpart in the criminal law is the judge's use of the presentencing report in making sentencing decisions. In the 1949 case of *Williams v. New York,*[518] the Supreme Court held that the sentencing judge's failure to conduct an evidentiary hearing on matters contained in a probation department presentence report was not a violation of due process. Though specifically overruled in the context of capital punishment,[519] *Williams* presumably still represents the Court's position in the area of sentencing for non-capital offenses.

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[514] *See, e.g.,* Codd v. Velger, 97 S. Ct. 882 (1977) (discharged probationary public employee must allege asserted ground of discharge was false in order to establish that requested hearing would serve any value).

[515] *See* notes 50–52 *supra.* The Occupational Safety and Health Act, 29 U.S.C. § 659 (1976), has been interpreted to require a hearing on both issues. *See, e.g.,* Long Mfg. Co. v. OSHRC, 554 F.2d 903 (8th Cir. 1977).

[516] Missouri, Kansas & Texas Ry. v. United States, 231 U.S. 112 (1913).

[517] Brennan v. OSHRC, 487 F.2d 438, 442 (8th Cir. 1973).

[518] 337 U.S. 241 (1949).

[519] Gardner v. Florida, 430 U.S. 349 (1977). *See also* Specht v. Patterson, 386 U.S. 605 (1967) ("adher[ing] to" Williams, but "declin[ing]" to extend it to the use of a confidential psychiatric evaluation report as a basis for imposing on a person convicted of a specified sex offense a separate conviction under a state "Sex Offender Act").

Nevertheless, it would be hazardous mechanically to extend the *Williams* holding to the civil penalty context. *Williams* itself may not stand for as extreme a position as sometimes thought, since the defendant in that case did not challenge any specific factual assertion made by the judge in his sentencing statement. Several lower courts have recently held that due process requires that a defendant be given an opportunity to examine a presentence report and to challenge factual assertions in it by argument and, perhaps, even by cross-examination.[520] Furthermore, the reasons for denying criminal defendants access to presentence reports will not often apply with similar force in the civil context. Presentence reports include information on virtually every aspect of the defendant's background and conduct, including perhaps candid statements by family and acquaintances. A requirement that all of this evidence be introduced by direct testimony subject to cross-examination would overwhelm the process and discourage candid statements.[521] By contrast, "sentencing" decisions in most civil money penalty cases are based on only a handful of factors. Problems of confidentiality would be rare and could be dealt with on an individual basis.[522]

There is a line of cases concerning review of administrative sanctions under the Food Stamp Act that appears hostile to a right of evidentiary hearing on the severity of a civil sanction. The Act authorizes the Secretary of Agriculture to disqualify a retail food store from participation in the program for violating the Act or implementing regulations.[523] The Secretary's determination is based on an informal procedure and is expressly subject to "trial de novo" in a federal district court.[524] A number of lower federal courts have held that the judicial "trial de novo" extends only to the issue of violation, not the severity of the penalty.[525] This position might suggest that there is no right to an evidentiary hearing, at any stage, on contested factual issues bearing solely on the penalty issue.

That interpretation, however, does not necessarily follow. None of the cases squarely presented that precise issue. The claim of the store owner in each case seemed to boil down to this: that, *based on the facts conceded* or

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[520] *E.g.,* Lindhorst v. United States, 585 F.2d 361 (8th Cir. 1978); United States v. Robin, 545 F.2d 775 (2d Cir. 1970); United States v. Espinoza, 481 F.2d 553 (5th Cir. 1973).

[521] *See* Williams v. New York, 337 U.S. 241, 249–50 (1949).

[522] *See* note 660 *infra.*

[523] 7 U.S.C. § 2020 (1976).

[524] 7 U.S.C. § 2022(c) (1976).

[525] *E.g.,* Nowicki v. United States, 536 F.2d 1171 (7th Cir. 1976); Martin v. United States, 459 F.2d 300 (6th Cir.), *cert. denied* 409 U.S. 878 (1972). *But see* Cross v. United States, 512 F.2d 1212 (4th Cir. 1975) (due process requires that penalty be subject to judicial review based on "arbitrary and capricious" standard); Goodman v. United States, 518 F.2d 505 (5th Cir. 1975). (interpreting statute to require same result).

found after de novo trial, the disqualification period was excessively harsh. Although the store owner in one case requested mitigation on the basis of facts not previously adjudicated, the court expressly noted that the statute did not require consideration of the asserted mitigating factor.[526]

In the context of a "de novo review" statute that did specify factors (mitigating and aggravating) to be considered in imposing a penalty—the Federal Coal Mine Health and Safety Act—the Supreme Court has expressly ruled that "the amount of the penalty is subject to *de novo* review in the District Court whether or not (an administrative) hearing was held."[527] This language suggests that a statutory "hearing" includes factual issues bearing on the applicability of any criteria for setting the penalty expressly specified in the governing statute. Enumeration of penalty standards creates a legal standard applicable in an adjudication. Either party should have an opportunity to introduce and confront evidence relating to the application of that standard.

A statute containing no explicit penalty criteria presents a harder case. In *United States v. J.B. Williams Company,* a panel of the second circuit stated that it would be "desirable" for a district court to conduct an evidentiary hearing in such a case.[528] This dictum seems sound, by analogy from the criminal context, when the defendant wishes to challenge the accuracy of factual assertions made by the government in justification for a severe penalty. But it seems questionable if intended to afford the accused an open-ended opportunity to introduce evidence on alleged mitigating factors not expressly recognized by statute.

C. When Must the Agency Conduct an Evidentiary Hearing?

The third step in defining the "formal" contours of a penalty-enforcement process is deciding under what circumstances the *agency* must conduct an evidentiary hearing. As discussed above,[529] due process cases requiring an administrative hearing are not necessarily applicable to most civil penalty situations, since the "deprivation" does not occur at the administrative stage. It is true, of course, that an alleged offender may be harmed by the agency's initiation of a penalty action,[530] but this harm alone probably would not constitute an injury to a protected interest, and in any event the subsequent trial would provide adequate protection.[531] Forcible administrative collection by offset or seizure might trigger a more plausible claim for an agency hearing. But here again, the temporary loss of the use of property would probably not be considered so serious as to compel a pre-deprivation administrative hearing if a reasonably prompt post-deprivation judicial hearing were available.[532]

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[526] Save More of Gary, Inc. v. United States, 442 F.2d 36, 39 (7th Cir.), *cert. dismissed,* 404 U.S. 878 (1971). *Cf.* Cross v. United States, 512 F.2d 1212, 1217 (4th Cir. 1975): "the gravity of the offense and possible mitigating circumstances usually present questions of fact."

[527] Kleppe v. Delta Mining, Inc., 423 U.S. 403, 409 (1976).

[528] 498 F.2d 414, 438–39 (2d Cir. 1974).

[529] *See* p. 316 *supra.*

[530] *See* P. Gerhart, *supra* note 12 at 75, noting the reporting of a penalty assessment as a contingent corporate liability may cause impairment of credit or decline in the market value of corporate shares. Failure to report such a contingent liability in a registration statement, for example, would probably violate federal securities law. *See* 17 C.F.R. § 210.3–16(i)(2) (1977) (requiring a "brief statement of contingent liabilities" in notes to financial statements); S.E.C. Form S-1, Registration Statement Under the Securities Act of 1933, Item 12 ("Legal Proceedings").

The principal source to which one must look, then for an administrative hearing requirement is the organic statute. Many statutes do require that the agency provide an opportunity for a "hearing" before assessing a penalty. Half of them use language which makes it clear that Congress had a trial-type hearing in mind.[533] The difficult case is the statute that merely uses the unadorned term "hearing." Must the agency afford a respondent a trial-type hearing, or will something less do? Sometimes the legislative history contains an answer.[534] Sometimes other sections of the statute provide a clue, such as the provision for judicial review of the agency's action. Specification of a "substantial evidence" standard implies a trial-type administrative hearing.[535] The formal reason for this is the traditional linkage, reflected in the APA, between "substantial evidence" review and a hearing "on the record."[536] The functional reason for this linkage is the view that "substantial evidence" review requires an exclusive agency record.[537] The implication, then, is that the agency has been given sole responsibility for factfinding. If one assumes that the due process clause requires a trial-type hearing at some stage, then that hearing must be conducted before the agency.

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[531] At least two courts have held, for example, that the Secretary of Labor need not conduct an evidentiary hearing before initially assessing an OSHA penalty subject to review in a de novo evidentiary hearing before OSHRC. Dan J. Sheehan Co. v. OSHRC, 520 F.2d 1036 (5th Cir. 1975), *cert. denied,* 424 U.S. 964 (1976); Frank Ivey, Jr., Inc. v. OSHRC, 519 F.2d 1200 (3d Cir. 1975), *aff'd sub nom.* Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977).

[532] *See* authorities cited note 524 *supra.* The precedents all require a showing of compelling governmental justification for summary seizure. Mere convenience in the collection of the prospective penalty may well be insufficient. Detention of vessels or vehicles used in violations of customs or immigration laws may, however, be justified as preventing removal of property from the jurisdiction or preventing future violations.

[533] *See* note 47 *supra.*

[534] *See, e.g.,* Cheramie Bo-Truc 5 v. United States, 538 F.2d 696, 698–99 (5th Cir. 1976); Independent Bankers Ass'n v. Board of Governors, 516 F.2d 1206, 1212–13 (D.C. Cir. 1976).

[535] *See, e.g.,* Independent Bankers Ass'n v. Board of Governors, 516 F.2d 1206, 1216 (D.C. Cir. 1975).

[536] 5 U.S.C. § 706(2)(E) (1976). *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).

[537] *See* Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act, 20 U.C.L.A. L. Rev. 899, 934 (1973). Cf.* Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1257–63 (D.C. Cir. 1973) (implying an agency duty to provide some opportunity for confrontation of adverse evidence and rebuttal in rulemaking proceeding subject to "substantial evidence" review). *See also* Industrial Union Dept. v. Hodgeson, 499 F.2d 467, 469 (1975) (difficulty of reconciling informal rulemaking procedures with substantial evidence review). On the meaning of "substantial evidence," see generally L. Jaffe, *supra* note 1 at 600–18.

This logic seems unobjectionable. But is the converse also true? That is, if the statute specifies de novo review,[538] can one conclude from that fact alone that Congress did not intend a trial-type agency hearing? The argument for such a conclusion is a pragmatic one: it is wasteful to conduct two trial-type hearings on a single case. One should not presume that Congress intended such an extravagant result unless it said so explicitly. When Congress has mandated de novo review, "hearing" will be interpreted to mean only an informal procedure comparable to notice-and-comment rulemaking.

A response to this argument is that a two-level trial system is not necessarily a wasteful extravagance. In the first place, the agency adjudication can be expected to dispose of most disputed cases, so that double trials will in fact occur in only a handful of cases. Even where they do, the results of the initial trial may be of some value in the later one. The court may benefit from the prior application of administrative experience to the particular problem. The agency's factfindings may have prima facie evidentiary value.[539] And the agency's interpretation of its own statute and regulations can greatly assist the court. Nonetheless, these benefits of a double trial system seem sufficiently uncertain that the courts should not interpret "hearing" in a "de novo review" statute to *require* a trial-type hearing. This reading derives support from section 5 of the APA, which exempts from the Act's requirements for a trial-type hearing any "matter subject to a subsequent trial of the law and the facts de novo in a court."[540]

Statutory clues about the meaning of "hearing" are sufficiently rare to leave a large number of cases not susceptible to resolution on that basis. To resolve such cases, one might turn to the APA. The Act requires use of its formal adjudicatory model[541] only in cases of "adjudication required by statute be determined on the record after opportunity for an agency hearing."[542] If the organic statute does not recite the talismanic phrase "on the record,'' then one could derive the implication that the hearing need not be a trial-type hearing. This argument can claim support in *United States v. Allegheny-Ludlum Steel Corporation*[543] and *United States v. Florida East Coast Railway.*[544] There, the Supreme Court interpreted the words ''after hearing,'' as used in section 1(14)(a) of the Interstate Commerce Act,[545] as not requiring a trial-type hearing.

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[538] One might conceivably draw a distinction between "de novo review" and "de novo trial" (or "civil action"), and interpret the former to restrict the reviewing court to the record compiled by the agency. The courts have not generally acknowledged such a refinement, however. *See, e.g.,* United States v. First City Nat. Bank, 386 U.S. 361, 368 (1966).

[539] *See, e.g.,* Redmond v. United States, 507 F.2d 1007, 1011–12 (5th Cir. 1975); Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review under the Administrative Procedure Act and Other Federal Statutes,* 75 Colum. L. Rev. 721, 763–64 (1975).

[540] 5 U.S.C. § 554(a)(1) (1976).

[541] 5 U.S.C. §§ 556–557 (1976).

[542] 5 U.S.C. § 554(a) (1976).

The difficulty in relying on these cases, however, is that they both involved what the Court characterized as ''rulemaking'' actions. In *Allegheny-Ludlum* both parties conceded that the administrative action was in the nature of rulemaking,[546] and in *Florida East Coast,* the Court concluded that the ICC's incentive per diem rate order was a ''rule'' because it applied to all carriers nationwide, was ''basically legislative,'' and was ''prospective in application only.''[547] In both cases the Court very explicitly distinguished earlier cases requiring a trial-type ''hearing'' as involving ''adjudicative'' facts.[548] Civil penalty cases are paradigmatic illustrations of ''adjudication'': they turn on evidence about specific individuals and events; they typically apply, rather than formulate, governing principles; and they are retrospective, rather than prospective in focus.[549] The two decisions, consequently, carry the apparent implication that a statute authorizing administrative penalty assessment only after ''hearing'' requires the agency to give the alleged violator an opportunity to meet and rebut the government's evidence—including a right to present oral testimony and to cross-examine adverse witnesses—consistent with the particularistic nature of the factual inquiry.

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[543] 406 U.S. 742 (1972).

[544] 410 U.S. 224 (1973).

[545] 49 U.S.C. § 1(14)(a) (1976): ''The Commission may, after hearing, . . . establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad. . . . '' In both cases the Court held that the organic statute failed to trigger the APA's formal adjudicatory procedures, because it omitted the ''on the record'' incantation. In *Florida East Coast,* the Court then turned to the distinct question of determining whether the organic statute, *ex proprio vigore,* gave petitioners a claimed right to present oral testimony and cross-examine adverse witnesses. Since the statute had been amended after passage of the APA, the Court referred to the APA, by analogy, to flesh out the meaning of ''hearing'' and concluded that in a proceeding for setting nationwide rates the statute did not require an opportunity to submit oral testimony or cross-examine adverse witnesses. 410 U.S. at 238–46.

[546] 406 U.S. at 756–57.

[547] 410 U.S. at 245–46.

[548] Morgan v. United States, 304 U.S. 1 (1938); Ohio Bell Telephone v. Public Utilities Com'n, 301 U.S. 292, 304–05 (1937); ICC v. Louisville & Nashville Ry., 227 U.S. 88 (1913); Londoner v. Denver, 210 U.S. 373 (1908).

[549] *See generally* 1 K. Davis, Adminstrative Law § 7.02 at 413 (1958) (making his celebrated distinction between ''legislative'' and ''adjudicative'' facts). *But cf.* Robinson, *supra* note 481 at 521–22 (disputing asserted qualitative distinction between factfinding in rulemaking and adjudicative proceedings).

Conceding that much, it is a short step to concluding that a civil penalty "hearing" statute triggers the full panoply of procedural elements implicated by APA sections 7 and 8—including, for instance, exclusivity of the record[550] and conduct of the hearing by an ALJ or agency member.[551] That is, the functional analysis utilized by the Court in *Florida East Coast* to interpret the word "hearing" as applied to a "rulemaking" activity becomes, when applied to an "adjudicative" activity, a surrogate for the "on the record" touchstone.[552] This conclusion accords with the Attorney General's contemporaneous interpretation of the APA.[553]

Despite the apparent force of this logic, several agencies have interpreted an unadorned "hearing" requirement in a civil penalty statute as not requiring a formal trial-type hearing modeled on section 5 of the APA.[554] In the view of some, a subsequent judicial enforcement action can fill in those missing elements.[555] As indicated earlier, a de novo judicial trial would in most cases satisfy due process requirements.[556] But that is no reason to believe that it would satisfy the congressional intent signified by a statutory requirement that the agency provide opportunity for a "hearing." There are sound practical reasons for interpreting such a directive to allocate fact-finding responsibility to the agency alone rather than dividing it between the agency and the courts. Since the agency must, under such a statute, hold at least an informal "hearing," the incremental social cost of transforming that hearing into a trial-type hearing will probably be much less than the cost of a full judicial trial. Among other things, the administrative trial—unlike the judicial trial—avoids the necessity for a jury.[557] Furthermore, very few civil money penalties involve the kind of *mala in se* offenses uniquely requiring reference to the "conscience of the community."[558] Most offenses involve technical, usually prophylactic rules whose interpretation and application are probably better committed to a national body of specialists than local generalist prosecutors, judges and juries.[559] On balance, then, both the governing precedents and practical considerations argue in favor of interpreting an unadorned "hearing" requirement in a civil penalty statute at least to mean a trial-type hearing of the sort required by due process, and quite possibly to trigger APA section 5.

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[550] 5 U.S.C. § 556(e) (1976).

[551] 5 U.S.C. § 556(b) (1976).

[552] *See, e.g.,* Independent Bankers Ass'n. v. Board of Governors, 516 F.2d 1206, 1216 (D.C. Cir. 1976) (question of whether public benefit of a bank holding company acquisition outweighs its cost involves adjudicative facts; hence formal APA adjudication required).

[553] U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 42–43 (1947).

The argument in the text could derive further support from the venerable case of Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), which held that APA section 5 could be triggered by a *constitutional* as well as statutory requirement for a hearing on the record. The application of *Wong Yang Sung* to the present discussion is, however extremely doubtful. First, although the Supreme Court reaffirmed its holding the next year in Riss & Co. v. United States, 341 U.S. 907 (1951), its continued viability is highly doubtful. Federal courts have not followed it consistently. *See* Note, *The Requirement of Formal Adjudication Under Section 5 of the Administrative Procedure Act,* 12 Harv. J. Legis. 194, 218–41 (1975). The Court's recent flexible approach to procedural due process seems incompatible with *Wong Yang Sung's* rigidity. *See, e.g.,* Memphis Light, Gas & Water Div. v. Craft, 98 S. Ct. 1554 (1978); Goss v. Lopez, 419 U.S. 565 (1975). Second, even to the extent *Wong Yang Sung* retains force, it is distinguishable from most civil penalty cases. *Wong Yang Sung* involved deportation of an alien, a "deprivation" which the administrative agency could effect by its own action. Hence, the hearing, to be useful, had to occur at the agency level. In the case of most civil money penalties, the "deprivation" occurs only after judicial enforcement action. Therefore, due process does not necessarily require any kind of *administrative*—as opposed to judicial—hearing. *See* p. 316 *supra.*

[554] *See* pp. 221–48 *supra.*

[555] At least one court has accepted a governmental stipulation to that effect. United States v. General Motors Corp., 403 F. Supp. 1151 (D. Conn. 1975). *But see,* United States v. Independent Bulk Transport, Inc., 394 F. Supp. 1319 (S.D.N.Y. 1975), requiring the agency to conduct a full hearing comporting with due process. The Coast Guard continues to resist providing a full evidentiary hearing. *See* 43 Fed. Reg. 54186 (1978).

[556] *See* pp. 319–320*supra.*

D. Should an Agency Conduct an Evidentiary Hearing Not Required by Law?

Even when the statute does not require an administrative trial, there may be instances in which it would be desirable for the agency to conduct one. As the Supreme Court has said, there is no *legal* impediment to an agency's providing more procedural formalities than the law requries.[560] The immediately obvious problem is one of efficiency. Attributes traditionally associated with trial-type procedures—oral testimony, cross-examination, use of counsel, transcription of the proceedings, a formal written decision—impose costs and delays not encountered in less formal procedures. All of these elements consume resources likely to be in short supply to the agency. What countervailing benefit might the agency realize to justify this cost?

One can think of at least three. The first is the possibility of forestalling de novo review at the judicial level by conducting a trial at the agency level.

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[557] *See* H. Zeisel, H. Kalven, Jr. & B. Buckholz, Delay in the Court 79 (1959) (estimating that jury trials take 67% longer than trials to a judge alone).

[558] Schwenk, *supra* note 30 at 52.

[559] Several courts have invoked the "agency expertise" factor in rejecting an invitation to cure deficient administrative factfinding by conducting a de novo judicial trial. *E.g., Secretary of Labor v. Farino, 490 F.2d 885, 892 (7th Cir. 1973) (denial of alien employment certificate); United States v. Independent Bulk Transport, 394 F. Supp. 1319, 1322-23 (S.D.N.Y. 1975) (civil penalty assessment for oil spill). Cf.* American Image Corp. v. United States Postal Service, 370 F. Supp. 964 (S.D.N.Y. 1974) (de novo review of stop-mail order appropriate because court is in as good a position as agency to ascertain violation).

[560] United States v. Florida East Coast Ry., 410 U.S. 224, 236 n. 6 (1973) (dictum).

by conducting a trial at the agency level. Can an agency, by conducting a trial-type hearing not required by statue, induce a court to accord a form of limited judicial review rather than conducting a plenary trial? The question does not lend itself to any simple answer: one must examine the structure of the statutory scheme. If the organic statute expressly provides for "de novo review" or "de novo trial," the answer clearly is in the negative.[561] But what if the statute, as is most often the case, is either silent about scope of review or provides merely that the penalty may be recovered in a "civil action?" These two formulations are functionally identical since section 2461(a) of the Juducial Code provides:

> Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.[562]

One response to this dilemma is to interpret "civil action" to require a plenary trial of all disputed issues of fact and law, regardless of what procedure the agency followed. The alleged violator may be required first to exhaust administrative remedies as a precondition for raising issues in the enforcement action,[563] but, so the argument goes, the creation of those remedies cannot foreclose the statutory right to an independent judicial resolution of those issues.

Support for this position might be sought in the Seventh Amendment's guarantee of a jury trial in "suits at common law."[564] A panel of the second circuit made such an argument in *United States v. J.B. Williams Company.*[565] That case involved an action brought by the government seeking civil penalties for violations of an FTC cease and desist order. The district court granted summary judgment for the government on the question of whether Williams in fact had violated the terms of the order. The FTC had conducted a trial-type hearing before issuing the order (to determine whether Williams' original advertisements violated the statute) but not before referring the case for prosecution (to determine whether Williams' subsequent advertisements violated the order). A majority of the appeals court held that the latter issue had to be submittd to a jury. An action by the government to collect a penalty is in the nature of a common law action in debt for which the right to a trial by jury has been preserved by the Seventh Amendment. Although Congress may provide for administrative adjudication of civil money penalties, it had not done so with sufficient clarity in the Federal Trade Commission Act.[566]

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[561] *Cf.* Chandler v. Roudebush, 425 U.S. 840 (1976) (interpreting legislative history of 1972 amendments to Title VII of Civil Rights Act of 1964 to require judicial trial de novo of federal employee discrimination claims).

[562] 28 U.S.C. § 2461(a) (1976). *See also* Helvering v. Mitchell, 303 U.S. 391, 402 (1938).

[563] *See, e.g.,* United States v. Ruzicka, 329 U.S. 287 (1946); United States v. Sykes, 310 F.2d 417 (5th Cir. 1962); Weir v. United States, 310 F.2d 149 (8th Cir. 1962). Because foreclosure of a defense to an enforcement action is a harsh result, courts usually require a showing that the failure to exhaust administrative remedies significantly disrupted the administrative scheme. *Compare* McGee v. United States, 402 U.S. 479 (1971) (exhaustion required) *with* McKart v. United States, 395 U.S. 185 (1969) (exhaustion not required).

[564] U.S. Const. Amend. VII.

[565] 498 F.2d 414 (2d Cir. 1974).

In *Atlas Roofing Company v. Occupational Safety and Health Review Commission,*[567] the Supreme Court subsequently reaffirmed its longstanding position that Congress may confer on administrative agencies authority to adjudicate civil money penalties. In that case, the Court upheld the statutory assignment of responsibility to adjudicate penalty cases for occupational health an safety violations to an administrative agency, subject to only lmited judicial review. The statute did not violate the Seventh Amendment's guarantee of jury trial in "suits at common law," the Court said, because the Amendment does not "render Congress powerless . . . to create new public rights and remedies by statute and commit their enforcement . . . to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries."[568]

It is hard to find in the *Atlas Roofing* opinion support for a presumption in favor of jury trial rather than an administrative trial. To the contrary, the Court exhibits a very conservative view of the Seventh Amendment's reach,[569] which suggests that the value of preserving jury trials may not, by itself, be sufficient reason to erect a presumption against administrative factfinding.

Nonetheless, the *J.B. Williams* case was probably correctly decided, but for reasons which make it clearly distinguishable from the situation presently under consideration. The FTC had not held a trial-type hearing on the disputed issues. Granting the government a summary judgment effectively denied Williams any hearing. The district court had not expressly considered the middle ground between de novo trial and summary judgment—namely limited review for abuse of discretion. Had the agency conducted a trial and had the district judge applied a standard of limited review, the result might have been different.

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[566] 498 F.2d at 438.

[567] 430 U.S. 442 (1977).

[568] 430 U.S. at 460.

[569] See 430 U.S. at 459: "The Seventh Amendment was declaratory of the existing law, for it required only that jury trial in suits at common law was to be 'preserved.' " The Court has interpreted the Seventh Amendment to require a jury trial of a housing discrimination claim under Title VIII of the Civil Rights Act of 1968, Curtis v. Loether, 415 U.S. 189 (1974), and an action to recover possession of real property, Pernell v. Southall Realty, 416 U.S. 363 (1974). But both cases involved disputes between two private parties under statutes clearly requiring a judicial forum.

The argument for that result requires a narrow reading of the expression "civil action," as used in organic statutes or section 2461 to describe the enforcement procedure. Its function, so read, is merely to designate the form of action—that is, a civil action, as opposed to, say, a criminal action—not to allocate decisional responsibilities between the courts and agencies or to define what issues may be contested at the judicial level. That function is performed by sections 5 and 10 of the APA,[570] as interpreted by the courts. The Supreme Court said in *Citizens to Preserve Overton Park v. Volpe* that de novo review is available only in two circumstances:

> When the action is adjudicatory in nature and the agency factfinding procedures are inadequate . . . [and] when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.[571]

A trial-type penalty hearing is "adjudicatory in nature" and is, by hypothesis, an "adequate" factfinding procedure. The second exception is not implicated, so the argument runs, because the action to be enforced is "adjudicatory." This argument relies, in effect, on a "traditional judicial distaste for *de novo* factfinding concerning matters properly delegated by Congress to the expertise of a regulatory agency."[572] Assuming that such a "traditional distaste" exists, however, one must still find that the matter is one "delegated" by Congress to agency "expertise." Finding such a delegation in every penalty statute not expressly requiring de novo judicial trial goes too far.

An explicit delegation of penalty "assessment" authority to an agency provides some evidence of such congressional intention. A formal assignment of the assessment function—especially if accompanied by enumerated criteria—evinces a legislative judgment that the matter is especially suited to the agency's consideration. Requiring an "assessment" by the agency gives greater assurance that specialized agency knowledge will be brought to bear and assessment levels will be uniform. Even though such a statute may not require an agency hearing, if the agency chooses to conduct a hearing, the courts should defer by granting only limited review,[573] unless the statute expressly requires "de novo" review. While this does amount to allowing the agency to define the effect of its orders, that power is implicitly conferred and narrowly confined by Congress.

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[570] 5 U.S.C. §§ 554(a)(1) & 706 (2)(F) (1976).

[571] 401 U.S. 402, 415 (1971). *See also* Camp v. Pitts, 411 U.S. 138 (1973).

[572] United States v. International Harvester Co., 387 F. Supp. 1338, 1341 (S.D.N.Y. 1974).

[573] In *International Harvester, supra,* the court granted de novo judicial trial in an action to enforce civil penalties assessed under a statute, the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1398(a) (1976), containing no "hearing" requirement. But the Court observed that: "If adequate rulemaking and hearing procedures are eventually established, the courts may be able to limit their review of future agency enforcement decisions to the traditional determination of whether of not such action was arbitrary or capricious." 387 F. Supp. at 1342. *See also* National Rifle Association v. United States Postal Service, 407 F. Supp. 88 (D.D.C. 1976).

A statute conferring on an agency only the power to "mitigate" a penalty presents a more difficult case. "Mitigation" may suggest a more limited inquiry than "assessment"—one which concerns itself solely with the amount of the penalty, not the determination of liability.[574] So understood, a delegation of "mitigation" authority alone would provide weak support indeed for an agency's assertion of exclusive factfinding competence. But, when used in a statute conferring no other explicit adjudicative function on the agency, the term necessarily has a broader meaning.[575] A body authorized to "mitigate" a penalty for an offense not yet formally adjudicated must unavoidably concern itself with the question of liability as well as the appropriate sanction. In that context "mitigation" necessarily implies a responsibility to ascertain the fact of violation itself. Consequently, even an agency whose only formal role in the penalty-imposition process is to "mitigate" a penalty can make a plausible claim to exclusive factfinding jurisdiction, so long as it conducts a sufficiently rigorous hearing to satisfy due process.[576]

In sum, there are some contexts in which courts should defer—by according only limited review—to findings and conclusions of an agency after an agency hearing not required by statute. This deference seems most proper where Congress by delegating an express penalty "assessment" or "mitigation" power, for example, has signaled the importance of having the agency's considered views on the issues presented.

Even if a court would not defer to agency findings to the extent of according limited judicial review, it might still be willing to accord them some weight in a subsequent enforcement proceeding. The agency's factfindings relating to the question of liability might well be treated as prima facie evidence of liability, subject to rebuttal.[577] This in itself might save the government witness time and prosecutorial effort. And the agency's penalty determination may be accorded presumptive validity, subject to modification only for abuse of discretion.[578] In this manner the agency could further its interest in assuring a consistent and effective system of penalties.

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[574] *See, e.g.,* Pound, *supra* note 72 at 934.

[575] *Cf.* p. 334 *infra* (arguing against an "excessively formalistic" view of mitigation that would forbid anticipatory mitigation).

[576] The EPA has taken this position in connection with enforcement of section 211(d) of the Clean Air Act, 42 U.S.C. § 1857f-6c (1976) (regulation of motor fule additives). *See* 40 Fed. Reg. 39962-63 (1975). The Administrator may "upon application, remit or mitigate" a penalty and "determine the facts upon such applications." The EPA seizes upon the latter phrase to justify its claim that, by establishing a formal adjudicative procedure, it can avoid de novo review. But its argument would be very nearly as strong even if its only delegated power were an unadorned "mitigation" authority.

[577] Courts have sometimes suggested that the administrative record should play no role whatsoever in a "de novo trial." *See, e.g.,* Horton v. Liberty Mutual Insurance Company, 367 U.S. 348, 355 (1961) (describing "de novo trial" as a new trial "wholly without reference to what may have been decided by the (agency)"). This may suggest a distinction between "de novo trial" and "de novo review." But, in the interests of judicial economy, the better rule is

Finally, even if a court in an enforcement action gave no deference whatsoever to the agency's findings, an optional agency hearing might still be useful as a means of increasing the rate of "voluntary" resolution at the pre-enforcement stage. For one thing, of course, a gratuitous pre-enforcement trial would enable the agency to discover its own errors and terminate further prosecution of weak cases. This benefit will not be significant if the agency's policy is to prosecute only "iron-clad" cases in which the evidence of violations uncovered by investigation is virtually incontrovertible. However, the hearing might still be useful to the extent that it fully satisfies the accused's demand for a participatory procedure. For those respondents whose propensity to litigate can be satisfied by a single hearing, an agency hearing can terminate cases which would otherwise have to go to judicial trial.

It is difficult to assess the weight of this potential benefit. If the violator's propensity to litigate is based primarily on a sense of injustice or on strategic considerations, a gratuitous agency hearing may well not satisfy him. He may demand the greater presumed neutrality or, perhaps, sympathy, of a jury or judge. On the other hand, the cost of litigation constrains most respondents' propensity to litigate.[579] The cost of a second hearing would deter all but the most persistent of litigants.[580]

If an agency, by conducting gratuitous hearings, can reduce the number or complexity of judicial enforcement actions, it may thereby increase its control over regulatory policy. By reducing the degree to which its enforcement policies are subject to re-examination and, perhaps, reversal, by prosecutors, judges and juries, it may be able to increase the uniformity and effectiveness of those policies. Whether this benefit outweighs the incremental costs of an optional hearing system is difficult to predict. To an

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to accord at least some evidentiary value to the record compiled on a formal agency hearing under either formulation of the judicial role. *See* 4 K. Davis, Administrative Law Treatise § 29.07 (1958). Several courts have taken this approach under the Food Stamp Act. *E.g.*, Redmond v. United States, 507 F.2d 1007, 1011–12 (5th Cir. 1975); Marbro Foods, Inc. v. United States, 293 F. Supp. 754, 755 (N.D. Ill. 1968).

[578] *Cf.* Goodman v. United States, 518 F.2d 505 (5th Cir. 1975) (although Food Stamp Act requires judicial trial de novo of violation, penalty proposed by agency upheld unless arbitrary or capricious).

[579] *See* pp. 239, 251, 260 *supra*.

[580] Of course, a cost-conscious litigant might prefer to skip the agency hearing and take his chances with the judicial enforcement action. But he would run the risk of having his defenses foreclosed for failure to exhaust his administrative remedies. *See* note 563 *supra*.

agency already equipped to conduct adjudicatory hearings, the added cost may not be great. If the availability of an agency hearing encourages a large number of respondents to litigate who would otherwise have settled, the cost may well exceed the benefit. On balance, it would appear that if, by instituting formal hearings the agency can forestall de novo review, the practice would usually be justified. In other cases, the cost is likely to exceed the possible benefits.

XII. The Initial Assessment Process

A process for imposing civil money penalties—like any sanctioning process—begins with an affirmative governmental decision. Although a complaint from outside the agency may initially set the process in motion, the agency usually has no legally enforceable obligation to pursue a lead.[581] Following common usage, as reflected in many penalty statutes,[582] I have referred to the administrative action that formally triggers the penalty-imposition process as the "initial assessment" decision.

Before initially assessing a penalty, of course, the agency must make a number of preliminary decisions, usually hidden from public view, but nonetheless significant in their impact on the regulatory scheme and potentially momentous in their impact on the individual. Some of those decisions relate to the question of whether to investigate a lead and, if so, in what manner and how thoroughly. The method used by an agency to investigate cases potentially involving violations of its laws may be the most important single phase of an enforcement program. Poor or inadequate investigation, at the very least, wastes considerable effort by both parties at the post-investigative stage, and may irrevocably prejudice the proper outcome of a case.

Most useful prescriptions about the investigative process are thoroughly rooted in the particular regulatory context. Good investigative technique depends critically on the nature of the violations and the character of the violators. Evaluating the quality of investigative technique would have required an immersion into substantive regulatory policy beyond the scope of this study. Nonetheless, observations made in the course of this study repeatedly dramatized the impact of investigative procedure upon the entire ensuing penalty-imposition process.

Once the agency has detected and documented an apparent violation, it must decide whether to seek the imposition of a sanction and, if so, what sanction to seek. This choice is the counterpart of that made by the criminal prosecutor. The administrative sanctioning decision presents questions, similar to those posed in the criminal context, about the wisdom and feasibility of confining and structuring prosecutorial discretion. That much-discussed subject[583] need not be reviewed here, except as it bears upon the use of the particular sanction—civil money penalties—that is the subject of this study.

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[581] For exceptions to that statement, see note 587. *infra.*

[582] *See* pp. 210–11 *supra.*

A. *Deciding Whether to Assess a Penalty*

Agencies make two kinds of "prosecutorial" decisions: whether to assess a penalty for a violation and, if so, in what amount. The first, referred to hereafter as the "charging" decision, is the subject of this section. The second, referred to as the "penalty" decision, is discussed in the following section. Both kinds of decisions present two distinct questions. What is the scope of the agency's discretion in making choices? To the extent that the agency possesses discretion, how should it exercise it?

Reviewing courts have traditionally defined the scope of prosecutorial charging discretion in extremely broad terms. For a variety of apparent reasons—including separation of powers notions,[584] doubts about judicial competence,[585] or perhaps just the force of history[586]—courts have been extremely reluctant to review prosecutors' charging decisions. Recently, this attitude has begun to change, particularly in the context of civil administrative enforcement.[587] The case for unreviewable charging discretion may be weaker in this context than in the criminal context. The goals of administrative regulatory policy are often better defined by statute and regulation than the goals of criminal enforcement. Administrative offenses usually lack the strong moral content of most common criminal prohibitions, which is often thought to necessitate a very wide scope of discretionary choice on the part of criminal justice officials.

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[583] *See, e.g.,* K. Davis, *supra* note 379 at 188–218 (1969); Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion,* 19 U.C.L.A.L. Rev. 1 (1971); Beck, *The Administative Law of Criminal Prosecution: The Development of Prosecutorial Policy,* 27 Am. U.L. Rev. 310 (1978); Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,* 13 Am. Crim. L. Rev. 473 (1976).

[584] *See, e.g.,* United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied* 381 U.S. 935 (1965).

[585] *See, e.g.,* Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967). *See also* Nader v. Saxbe, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974); Terminal Freight Handling Co. v. Solien, 444 F.2d 699, 708–09 (8th Cir. 1971), *cert. denied,* 405 U.S. 996 (1972).

[586] *See, e.g.,* Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868); Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840); J. Hurst, Law and Social Order in the United States 135–39 (1977).

The relative influence of experience and logic is perhaps revealed by the fact that Continental prosecutors exercise little charging discretion. *See* Langbein, *Controlling Prosecutorial Discretion in Germany,* 41 U. Chi. L. Rev. 439 (1974); Myhre, *Conviction Without Trial in the United States and Norway: A Comparison,* 5 Houstan L. Rev. 647 (1968).

[587] *See, e.g.,* Dunlop v. Bachowski, 421 U.S. 560 (1975); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot,* 404 U.S. 403 (1972); Environmental Defense Fund v. Hardin, 428 F.2d 1093 (1970). *See also, e.g.,* United States v. Jacobs, 531 F.2d 87 (2d Cir.), *vacated and remanded,* 429 U.S. 909, *reaffirmed,* 547 F.2d 772 (2d Cir. 1976), *cert. dismissed,* 98 S. Ct. 1873 (1978) (criminal case).

Although administrative prosecutorial decisions are increasingly subject to judicial review for abuse of discretion, that does not necessarily mean that agencies lack discretion to decline prosecution of particular suspected violations.[588] It may mean only that the decision not to prosecute A or to prosecute B must not be based on personal favoritism or vindictiveness.[589] The pragmatic need to allocate scarce resources and the presumed difficulty of writing binding rules for the exercise of choice will discourage courts from going further than that. Courts, therefore, will probably interpret civil penalty statutes patterned after criminal statutes not to impose a judicially enforceable duty of universal prosecution on the agency. Most "court-assessment" statutes are of this type: they recite that a person who engages in certain conduct "shall be liable to"[590] or "shall forfeit to the United States"[591] a specified penalty. Despite the mandatory "shall," such statutes do not address the agency's or even usually the Attorney General's, prosecutorial obligation directly, and certainly not with enough specificity to override a presumption of prosecutorial charging discretion.

Explicit statutory language can, of course override that presumption. In a handful of recent cases, courts have interpreted regulatory statutes to impose on an agency a judicially enforceable duty to initiate enforcement actions.[592] In the context of administrative civil money penalties, there are many statutes which could be interpreted to impose such a duty. Many "agency-assessment" statutes fall into this category. For example the Mine Safety Act provides that if, after inspection , the secretary "believes" that a mine operator has violated a safety standard, he "shall" issue a citation,[593] and if the secretary issues such a citation, he "shall notify the operator . . . of the civil penalty proposed to be assessed."[594] With regard to issuing a citation, the agency retains the degree of discretion implied by the term "believes." And the Act preserves some charging discretion since it states that "[e]ach occurance of a violation of a mandatory health or safety standard *may* constitute a separate offense."[595] But, MSHA takes the view—correctly, I think—that once a citation issues, it has no discretion to refuse to assess a penalty, no matter how inconsequential the violation or immediate its correction.[596]

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[588] This is not to say that systematic failure to enforce a regulatory program might not be judicially cognizable. In several recent cases, courts have granted broad injunctive remedies for systemic nonenforcement. *E.g.,* Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973), *affirmed in part,* 480 F.2d 1159 (D.C. Cir. 1974), (en banc); American Pub. Health Ass'n. v. Veneman, 349 F. Supp. 1311 (D.D.C. 1972). *See generally* Note, *Judicial Control of Systemic Inadequacies in Federal Administrative Enforcement,* 88 Yale L.J. 407 (1978).

[589] *See* FTC v. Universal-Rundle Corp., 387 U.S. 244, 251 (1967): "the Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry." *Cf.* Blackledge v. Allison, 431 U.S. 63 (1977) (condemning "vindictive" indictment of criminal defendant for exercising procedural rights with respect to previous conviction). *See also* North Carolina v. Pearce, 395 U.S. 711 (1969).

[590] *E.g.,* 49 U.S.C. § 6(10) (1976) (common carrier tariffs).

[591] *E.g.,* 47 U.S.C. § 202(c) (1976) (unjust discrimination by communication common carrier).

[592] *E.g.,* Dunlop v. Bachowsi, 421 U.S. 560 (1975); Environmental Defense Fund v. Ruckelshaus, 429 F.2d 584 (D.C. Cir. 1971); American Pub. Health Ass'n. v. Veneman, 349 F. Supp. 1311 (D.D.C. 1972).

[593] 30 U.S.C. § 814(a) (Supp. 1978).

The fact that many agencies retain a broad range of charging discretion not subject to judicial interference does not mean that the agency should not make some effort to structure that discretion. The choice of which offenses to prosecute can have significant impact on the fairness and the effectiveness of the regulatory program. Arguments made earlier[597] for setting and publicizing standards for determining penalty amounts apply with comparable force here. An example of an attempt to structure broad enforcement discretion is the EPA's policy statement on seeking civil penalties for air and water pollution.[598] The statement directs regional enforcement personnel to concentrate on "major" sources of air and water pollution that have delayed compliance beyond a specified date. The agencies in the present study, however, have not articulated very specific policies for prosecutorial charging decisions. The officials interviewed provided only an impressionistic explanation of how the agency chooses whether to prosecute a violation and which type of sanction to seek. Most officials claim to seek criminal sanctions or license revocation for "serious" offenses and civil money penalties in all other cases unless the evidence is "weak." Statements such as these suggest room for improvement in the structuring of charging discretion.

B. *Setting the Penalty Amount*

The second type of prosecutorial discretion described earlier involves the determination of the level at which to assess a penalty. Here, as in the "charging" decision, one must look to the authorizing statute to define the scope of the agency's discretion. A varible-penalty statute[599] confers on the agency a range of "penalty" discretion in order to enable it to tailor the penalty to the particular circumstances of the violation and the offender. A fixed-penalty statute, on the other hand, seems to foreclose the exercise of administrative discretion in assessing the penalty. Statutory specification of the penalty level manifests an apparent legislative judgment that the interests of justice and regulatory efficiency will be better served by prescribing a definite, certain, invariable punishment, than by conferring discretion on either an administrator or a judge to tailor the punishment to the circumstances. Congress may feel that only an absolutely certain punishment will effectively deter a particular type of conduct. In those cases in which Congress has made such a judgment, the enforcing agency must honor it by assessing the stipulated amount.

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[594] 30 U.S.C. § 815(a) (Supp. 1978).

[595] 30 U.S.C. § 820 (Supp. 1978) (emphasis added).

[596] Some "agency-assessment" statutes, on the other hand, preserve the agency's traditional charging discretion. *E.g.*, 7 U.S.C. § 9 (1976) (Commodity Futures Trading Commission "may assess" penalty for violation of chapter); 16 U.S.C. § 1375a (1976) (any person who takes protected marine mammals "may be assessed a civil penalty by the Secretary" of Interior or Commerce).

[597] *See* pp. 287–92, 306–10 *supra.*

[598] *See* EPA, *supra* note 412.

[599] *See* pp. 213–14 *supra.*

An agency may, however, be able to point to other possible sources of "penalty" discretion even when enforcing a fixed-penalty statute. The most promising is an express mitigation authority. Delegation of power to mitigate a fixed penalty indicates a congressional recognition of the need to individualize. It states implicitly that the fixed penalty, however appropriate in the average run of cases, is too rigid to serve the ends of justice and regulatory effectiveness in all cases. Some sort of safety valve is needed.

That is true, one might answer, but it does not justify a practice of setting initial assessments below the statutorily prescribed level. Mitigation is an act of mercy, exceptional and dispensational: allowing the agency to grant "anticipatory" mitigation permits the exception to swallow the rule. Furthermore, agencies will rarely possess reliable evidence of mitigating circumstances at the time of initial assessment. Premature mitigation will frequently result in excessive leniency.

This argument reflects an exaggeratedly formalistic view of mitigation. As indicated in the case study of the FCC's Special Radio Service Bureau,[600] such a view may not only produce unjust inconsistency of treatment, but can as easily subvert as promote other regulatory goals. To force a person otherwise eligible for mitigation to request it affirmatively may trap the unwary and escalate the transaction costs of the proceeding.[601] It may be true that mitigation requests will often turn on information not in the possession of the agency at the time of initial penalty assessment. But this fact argues not against "anticipatory" mitigation in principle, but rather for the use of caution in its exercise. Whether assessing a variable or a fixed penalty, the agency should base its assessment only on reliable information unearthed by its preliminary investigation. For that reason the agency should not ordinarily adjust an initial assessment figure to accommodate a presumed inability to pay a higher amount.[602] But when the agency possesses reliable information which would be the basis for mitigating a fixed penalty on request, it should not be foreclosed from granting an "anticipatory" mitigation.

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[600] *See* pp. 268–69 *supra.*

[601] The ICC case study suggests further support for this conclusion. *See* pp. 281–82 *supra.*

[602] *See* p. 247 *supra.*

Agencies lacking an express statutory authority to mitigate a fixed money penalty might point to the Federal Claims Collection Act[603] as another potential source of discretion to assess penalties at a lower level. The Act, after all, authorizes agencies to "compromise" any "claim". Since the agency may settle a "fixed-penalty" claim at a lesser amount, so the argument runs, it may initially assess the penalty at a level approximating its probable settlement value.

This argument is considerably weaker than the argument based on an express mitigation authority. Congress passed the Claims Collection Act to give Federal agencies general authority to settle governmental claims without having to refer them to the General Accounting Office or the Justice Department.[604] Although the language of the Act is broad enough to encompass civil money penalty claims, its principal sponsors emphasized its application to contract and tort claims.[605] It cannot be read as a congressional statement about the need to individualize the assessment of civil monetary penalties in the interests of regulatory effectiveness or justice.

Although the Act does not specify standards for the "compromise" of a claim, it is implicit in the statutory purpose that the principal, if not exclusive, criteria are the costs and prospects of collection.[606] This conclusion is reinforced by the statutory requirement that agency heads "shall attempt collection of all claims" and the specifications of "financial ability to pay" and "cost of collection" as the criteria for terminating collection action altogether.[607] Regulations jointly promulgated by the Attorney General and Comptroller General under the Act's authority make explicit this conclusion. The only bases on which the rules permit an agency to compromise a claim are "ability to pay," "litigative probabilities," and "cost of collecting claims."[608] The rules implicitly enjoin agencies from compromising penalties or forfeitures unless "the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served" by the compromise.[609]

The Claims Collection Act and its implementing rules, then, do not confer a broad authority to "mitigate" a fixed penalty. Only on the basis of very limited criteria relating to the difficulty of collection may an agency reduce a penalty claim otherwise appropriate to serve regulatory goals. When the Congress has specified what that amount is, the agency must "attempt to collect" it. It is true that an agency might anticipate collection difficulties at an early stage. But it will usually be particularly difficult to quantify those considerations on the basis of information obtained ex parte.[610] Preserving a clear distinction between the "claim" (at the statutorily fixed level) and its "compromise" will best reconcile the objectives implicit in the two statutory schemes.

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[603] 31 U.S.C. § § 951–953 (1976).

[604] *See* Senate Judiciary Comm., Senate Report No. 1331, 89th Cong., 2d Sess., *reprinted in* 2 U.S. Code Cong. & Ad. News 2532, 2533–34 (1966).

[605] *See, e.g.,* Hearing on H.R. 13651 Before Subcom. No. 2 of the House Judiciary Comm., 89th Cong., 2d Sess., 22, 24, 26 (1966) (statement of John W. Douglas, Assistant Attorney General).

[606] *See* Senate Judiciary Comm., *supra* note 604 at 2533 (bill designed to enable agencies to "compromise" a claim "if such a settlement would be in the interest of the Government and justified by normal practice in business in the light of the debtor's ability to pay and the risks and costs inherent in litigation").

[607] 31 U.S.C. § 952 (1976).

[608] 4 C.F.R. §§ 103.2–103.4 (1978).

[609] 4 C.F.R. § 103.5 (1978).

There remains the question of whether agencies do not possess an "inherent" penalty discretion. An agency might argue that, since it can often influence the total potential liability of an offender by its choice of investigative and charging policy, one should forthrightly recognize a penalty discretion as well. The pragmatic justifications for a broad charging discretion, however, do not require a broad penalty discretion. Certainty of punishment may have some deterrent value even though the prospect of detection and prosecution is unavoidably uncertain. Where Congress has expressed its intention about the certainty of the penalty, no invocation of "inherent" penalty discretion should be permitted to override that expression.

Defining the scope of an agency's "penalty" discretion is only the first step. To the extent that the agency has discretion in setting the penalty amount, it must decide whether and how to use that discretion. Should it initially assess a penalty at the statutory maximum or at some lesser amount more closely approximating its estimate of the "proper" amount?

A policy of initially assessing a variable penalty at the statutory maximum has some advantages. Invoking the highest potential monetary liability maximizes the impact of the assessment notice on the respondent. This, in turn, maximizes the likelihood that the notice will be taken seriously and answered expeditiously. Assessing at the maximum may also be viewed as strengthening the agency's bargaining position. It creates a "concession"—reduction of the penalty demanded—which the agency can offer the respondent in return for relinquishing his right to demand a hearing, and it enables the agency to conceal its minimum position as long as possible. Finally, of course, the agency may simply lack sufficient information at the time the penalty is initially assessed to make a more accurate estimate of the ultimate liability.

The policy has corresponding drawbacks, of course. In some cases, the respondent may pay the penalty amount initially assessed even though it is out of proportion to the amounts customarily paid for similar offenses or the amount necessary to serve the statutory purpose.[611] Such voluntary "overpayment" may occur because the respondent is unaware of the possibility of mitigation or is deterred from seeking mitigation by either the apparent cost, relative to the potential benefit, or fear of antagonizing the agency.[612] There may be other cases in which over-representing the likely outcome needlessly increases the transaction costs of the penalty settlement process.[613] A high assessment may induce a recipient to hire a lawyer or prepare elaborate documentary defenses, when a more moderate assessment could have produced a quick settlement.

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[610] Indeed, I have urged agencies to use caution in utilizing these considerations at any stage because of the difficulties inherent in their measurement and application. *See* pp. 304–05 *supra.*

The balance struck by these competing considerations will vary with the context. Generally, the case for assessing at the maximum is strongest in cases involving large sums. The transaction costs involved in these cases are likely to be relatively high in any event, the danger of taking unfair advantage of unsophisticated offenders slim, and the need for enhanced agency bargaining power greater. Conversely, the case for assessing a moderated amount is strongest when the proper penalty is relatively small, especially when the typical respondent is not likely to be very sophisticated about agency policies. The fact that the penalty calculation may depend on information within the respondent's possession should not excuse the agency from making an effort to estimate the penalty based on those factors with respect to which its investigation has generated reliable information.

C. *Locus of Assessment Authority*

An issue closely related to the scope and exercise of assessment discretion is the locus of assessment authority. Who in the agency should have authority to assess a civil money penalty? One can identify at least four functional locations: the investigative staff, supervisory or administrative officials in the field, a supervisory or administrative official at headquarters, or the head of the agency. The last of these seems likely to be an attractive solution in the most limited number of cases. Only penalty assessments involving a very significant impact on regulatory policy require the personal attention of an agency head. It is difficult to define this category in advance. The dollar amount assessed may be one indicator, but it is not necessarily a consistent indicator. As the FCC's previous $2,000 delegation limit illustrated,[614] a dollar limit on the delegation of assessment authority must be set in a sensitive fashion and re-evaluated periodically. Otherwise, it may introduce an unintended bias into the agency's overall pattern of penalty assessments.

Few agencies authorize primary investigators to assess penalties and, I think, for good reason. The assessment process usually requires the exercise of considerable judgment about enforcement policy. The assessing authority must usually make a preliminary decision concerning the type of sanction to seek and, if he chooses a civil monetary penalty, the proper amount. While investigators are trained to know and apply the governing legal standards, they do not necessarily have sufficient knowledge of applicable principles to resolve close questions of interpretation. Nor are they likely to be able to assess whether the agency's enforcement resources are sufficient to warrant prosecution of the case. Their closeness to the evidence may impair their capacity to evaluate the strength of the case that the agency can present to an impartial adjudicator. In some contexts investigators may be too familiar with a violator to make a truly objective assessment of liability. Finally, separating the assessment and investigatory process gives the agency a built-in check on the quality of its investigations.

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[611] *See* p. 268 *supra* for an illustration.

[612] *See* pp. 262–64 *supra.*

[613] *See* p. 298 *supra.*

[614] *See* pp. 257–58 *supra.*

As a consequence, delegation of assessment authority to investigative staff seems justified only in a very narrow range of cases where the effectiveness of the enforcement process would suffer materially in its absence. The FCC's procedure for CB enforcement is an example.[615] The Commission felt that immediate penalty assessment was necessary because of the brief duration of the limitations period and in order to maximize the impact of a concentrated enforcement program. Even in such a context, however, an agency should minimize the potential risks inherent in a system of investigatory penalty assessment—as did the FCC—by structuring assessment discretion to the greatest possible degree.

Similar considerations inform the choice between assigning assessment authority to a field office or a central office. One presumptively effective way to reduce decisional inconsistency in a system is to reduce the number of decisionmakers. This tactic may facilitate reduction of inconsistency between decisionmakers, as well, by reducing training costs and, if they are located in the same office, increasing interactions among them. These considerations motivated MESA to centralize its penalty assessment process.[616] That undertaking demonstrates that even a very large-volume nationwide program can be effectively centralized.

The mine safety case illustrates, on the other hand, one important constraint on the centralization of assessment. To the extent that a smoothly functioning prehearing process requires some form of participatory procedure, such as the oral conference system there provided, it is essential that violators have access to personnel with decisionmaking authority.[617] In a nationwide enforcement program, access to this kind usually implies decentralization of authority. This does not necessarily mean, however, that

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[615] *See* pp. 267, 269 *supra.*

[616] *See* p. 231 *supra.*

[617] The personal interview employed as part of the CB enforcement process failed for lack of this ingredient. *See* p. 271 *supra.*

initial assessment authority must be decentralized. The tension preserved in the MSHA system between centralized assessment and decentralized mitigation provides a useful check against error.

D. The Assessment Notice

Although many statutes expressly require agencies to give "notice" of a penalty assessment to the alleged violator,[618] relatively few specify the contents of such notice.[619] Except in the relatively rare case of self-executing agency collection procedure,[620] a "notice" requirement is technically superfluous. Since the agency has the burden of collection, it must initiate the communication process.

For the same reason, one could claim that an "adequacy" requirement is equally superfluous. The agency's initial communication must be sufficiently clear to get the alleged offender's attention and stir him to respond. Any deficiency in the notice will be self-correcting since the recipient will simply fail to reply or request further information. As the ICC case study demonstrates, the informational content of the penalty "notice" implied by such a standard is indeed minimal.[621]

This does not mean, however, that an "adequacy" requirement is useless. At a minimum, such a requirement can spare the respondent time and trouble to determine the precise nature of the charges. All assessment notices should specify the statute or regulation allegedly violated and summarize the facts upon which the charge is based. Often the recipient will need to check with his own employees or other persons to verify the allegations and to check with an attorney to examine the lawful basis of the claim. This process can proceed most expeditiously if the information is complete. Similarly, the notice should specify the precise penalty amount assessed and, to the extent feasible, the basis for its determination. That much information is necessary to enable the recipient to gauge his response.

XIII. THE MITIGATION PROCESS

The recipient of an initial penalty assessment has essentially three options: to pay it, to ignore it, or to contest it. As the case studies indicated, respondents select the first option in a very large percentage of cases.[622]

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[618] By implication, at least, all 141 of the "agency-assessment" statutes require notice. Most of the 54 "hearing" statutes expressly require "notice".

[619] *E.g.,* 47 U.S.C. § 503(b)(4) (Supp. 1978) (FCC notice of apparent liability must identify specific rule violated, acts or omissions alleged, and date of such conduct).

[620] *See, e.g.,* note 512 *supra.*

[621] *See* pp. 278–79 *supra.*

[622] *See* pp. 251 (between 60 and 70% of oil spill penalties paid on demand) and 260 *supra* (70% of broadcast forfeitures paid on demand). But *cf.* Table I p. 229 *supra* (12% of mine safety violations closed after initial assessment).

That fact reinforces the need to assure the accuracy of the initial assessment process.[623] The second option—not infrequently exercised in many regulatory regimes[624]—challenges the government to devise efficient enforcement mechanisms. The existing practice of initiating an enforcement action in federal district court is probably effective in most contexts except those in which the value of the claims or the prospects of collection are so low as to discourage the agency or the Justice Department from making the effort in the first place.[625] In that case, it may be necessary either to adopt some more summary mode of collection[626] or to invoke some more serious form of sanction.[627]

A. *The Need for an Informal Mitigation Process*

This section concerns the third option available to the recipient of an assessment notice—to contest the assessment. A contest may be addresssed to either the question of liability, or the amount of the penalty, or both. In this section, I use the term "mitigation" in its broadest sense, to refer to the process by which an agency receives and disposes of such contests.[628]

The case studies indicate that propensity to contest an initial assessment notice depends on a variety of factors including the character of the regulated population[629] and its sense of dependence on harmonious governmental relations,[630] the amount of the penalty initially assessed,[631] the specificity of the liability and penalty standards,[632] the reliability of the methods used to detect violations,[633] and the adequacy of the assessment notice.[634] Although some of these factors—such as the character of the regulated population—may not be subject to the agency's direct control, the enforcing agency possesses the capacity to exert at least some influence over most of them. Since the efficiency of an enforcement process depends in part on the propensity of alleged offenders to contest assessments, agencies may justifiably pursue measures designed to reduce that propensity, so long as the resulting efficiency gains exceed the attendant costs to other compelling regulatory objectives such as deterrent efficacy or procedural fairness.[635]

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[623] *See* p. 334 *supra.*

[624] *See* Table 1, p. 229 *supra* (suggesting that over 3% of MSHA assessments are defaulted); p.251 *supra* (suggesting a default rate on oil spill assessments possibly as high at 11%); and p. 271 (noting 30% rate of closure of CB forfeiture cases as "uncollectible").

[625] The CB enforcement program best illustrates this problem. *See* pp.271–73 *supra.*

[626] *See* note 512 *supra* for illustrations. Summary detention or seizure of property, however well the device has fared in litigation (see note 513 *supra*), raises profound questions of fairness. *See generally* Freedman, *Summary Action by Administrative Agencies,* 40 U. Chi. L. Rev. 1 (1972). A summary seizure procedure designed solely to facilitate collection of fines, such as the growing use of "Denver boots" to collect outstanding traffic fines, presents most troublesome legal as well as political problems.

[627] Invocation of more serious penalties (license revocation or criminal prosecution) is the only collection method used—albeit very rarely—in the CB context. *See* pp.271–72 *supra.* That, in essence, is the strategy recently adopted by the ICC as well. *See* p. 282 *supra.*

[628] *See* p. 328 *supra.*

[629] *See, e.g.,* pp. 235–36 *supra* (noting the relatively high propensity to contest among mine operators).

[630] *See, e.g.,* p. 264 *supra* (broadcast licensees).

[631] *See, e.g.,* pp. 240(mine safety), 252(oil spills), and 262*supra* (broadcast regulation).

[632] *See, e.g.,* pp. 239–40*supra* (comparing propensity to contest "regular assessment" and "special assessment" mine safety assessments).

[633] *See* p. 262 *supra.*

[634] *See* pp. 278–79 *supra* (ICC).

This section discusses a variable that affects both the popensity to contest and the fairness of the process—the procedures provided by an agency to handle mitigation requests. As I concluded earlier,[636] the Constitution guarantees to all persons on whom a civil money penalty has been assessed an opportunity to contest that assessment in some sort of evidentiary hearing. Yet this opportunity for a judicial or, in some cases, administrative[637] trial is not, by itself, a sufficient process for the mitigation of penalties. For a trial procedure alone may not fully satisfy the twin objects of fairness and efficiency that a mitigation process should serve. The expense of a trial-type hearing can nullify its practical utility. The very decision to make a formal charge, moreover, may impose a kind of injury—a psychological anxiety or a weakening of credit position[638]—that generates a legitimate demand for more immediate explanatory and participatory procedures. Informal prehearing procedures can resolve a dispute on a more economical and expeditious basis than is possible by trying the case. In the absensce of a powerful countervailing interest, then, an agency should provide a structured opportunity to pursue consensual prehearing resolution of a disputed assessment case.

The only conceivable reason for not providing an informal mitigation process would be to discourage frivolous challenges by persons not genuinely dissatisfied with the fairness of their treatment. A responent would presumably undertake such a challenge only if he assigned a fairly high probability to his chances of persuading the agency that his claim was legitimate. If an agency perceives a need to reduce the apparent odds that nonmeritorious claims might prevail, the preferable technique is to clarify standards and tighten investigatory procedures, rather than to close off informal avenues of protest. Futhermore, persons motivated to press claims—whether legitimate or otherwise—are not likely to be deterred by the lack of an official system for doing so. If an official grievance process were not established, an unofficial one would almost invariably emerge, since agency personnel share the respondents' desire for expeditious means of settling disputes.

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[635] Trade-offs among these objectives are unavoidable so long as the agency's enforcement resources are limited. *See* pp. 308–09 *supra.* The higher the average assessment level, for example, the smaller the number of enforcement cases the agency may be able to close at an early stage. *See* pp. 239–40 *supra.* But deliberately reducing penalties so as to increase the rate of "voluntary" payment is a very risky bargain. The deterrent and compensatory value of a penalty whose collection depends primarily on voluntary payment is likely to be quite small. Even it that strategy maximized agency collections, it would probably also maximize net (uncompensated) social harm as well.

[636] *See* pp. 314–17 *supra.*

[637] *See* pp. 319–24 *supra.*

[638] *See* note 530 *supra.*

B. Presentation of Mitigation Requests

The design of a prehearing process must of course reflect the "technology" of the regulatory program—the nature of the substantive standards enforced, the factual disputes typically presented, and the means available for detection and investigation of violations. But it should also be responsive to the characteristics of the participants themselves and the determinants of their relative bargaining positions—the skill and sophistication of the typical offender, the amounts at stake relative to costs of adjudication and the resources of the agency, and the attitudes of prosecutors and courts. This section examines the ways in which those variables affect the design of an effective prehearing mitigation process.

The agency's first task is to provide some vehicle for communication of exonerating or mitigating information without so encumbering the prehearing process as to destroy its utility. It is difficult to make useful generalizations about the cost-effectiveness of modes of communication. A fifteen-minute telephone converstion may be both less expensive and more informative than the submission of a written reply. Yet an oral conference, complete with counsel and witnesses, may be far more expensive and no more informative than a well-written letter. Prescribing prehearing procedures, in the abstract, is not really a productive activity. Agencies must unavoiably adjust the procedures to the reality of their situation. To some extent, procedures may be thrust upon them since most alleged offenders who feel genuinely wronged will find some means of communicating that feeling.

The agency procedures examined in this study suggest merely a few parameters which can guide the evolution of such a procedure. In the first place, written communication is always superior to oral communication in the sense that it is preserved for the record. It provides a basis for subsequent administrative audit or review of a penalty assessment or mitigation decision. It facilitates the subsequent use of the case for precedential purposes. And, of course, it helps to build a case file for eventual prosecution.[639] Consequently the agency should not only receive, but encourage the submission of, written replies. The staff time consumed by reading even useless correspondence is not likely to be substantial.

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[639] It is for these reasons, for example, that the FCC's Broadcast Bureau insists on written mitigation requests. *See* p. 258 *supra*.

Oral communication presents more difficult choices. Agency officials are unlikely to—and probably never should—refuse to accept at least an initial telephone call from an alleged violator. Nor should agency officials refuse a personal interview or conference if it appears from a preliminary response that important factual or interpretive issues have been raised which might be resolved in the process.[640]

This does not mean, however, that an agency should extend a right to an oral conference as a general practice. The special advantages afforded by oral procedure—the greater opportunity to test, elaborate, and explain—may require a degree of formality that quickly destroys its usefulness. Establishing an opportunity for oral hearing, moreover, has important implications for the locus of authority in the agency. As the FCC's experience with citizens' band violators demonstrates,[641] in order to make oral conferences both accessible and functional, the agency must decentralize its penalty mitigation authority. This, in turn, imposes further costs on the agency, in the form of either greater inconsistency of decision[642] or greater training and quality control costs.[643]

Most agencies that routinely provide an opportunity for oral conference sensibly allow the respondent to bring an attorney and witnesses.[644] The small sums at stake in most penalty cases operate as an effective constraint on the abuse of such a privilege. In more serious cases involving large sums, respondents are unlikely to settle without an attorney's assistance and, in some cases, a chance to present direct testimonial evidence. On the other hand, agencies wisely resist requests to produce investigative personnel to answer questions. That practice could impose considerable costs on the agency in lost investigative time. Since the presence of investigators is costless to the respondent, he has little incentive to minimize such requests. If issues of investigative accuracy or reliability arise with any frequency, the agency should review its investigative practices or substantive standards. This does not mean that the presence of an investigator at an informal conference might not be warranted on occasion. But the agency should first require the respondent to justify the need for the investigator's presence by identifying the precise point of dispute,[645] and then make an effort, ex parte, to obtain clarification from the investigator.

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[640] *See, e.g.,* Legal Times of Washington, January 1, 1979, at 4 (describing FTC policy denying or limiting opportunities for oral conferences between agency officials and respondents' attorneys).

[641] *See* pp. 269–71 *supra.*

[642] *See, e.g.,* pp. 240–41, 252–54 *supra* (describing interdistrict variations in MSHA and Coast Guard mitigation practices).

[643] *See* p. 231 *supra* (discussing MSHA's reasons for centralizing penalty assessment responsibility).

[644] *See* p. 221supra. See also pp. 232, 247 (MSHA and Coast Guard case studies).

[645] The Coast Guard's recent regulations contain this sensible precaution. *See* C.F.R. § 1.07–55, *as inserted by* 43 Fed. Reg. 54188 (1978).

Likewise, agencies need not ordinarily go to the expense of recording the conference, since the format for presenting evidence and arguments is sufficiently casual that little would be gained by that formality. If, however, the agency official who conducts the conference does not have authority to rescind or modify the original assessment—a situation which I have criticized—the expense of a transcript might be justified. In either case, the agency should have no objection to a request by a respondent to pay the expense of recording the conference.[646]

There is some obvious value in a policy of choosing relatively impartial agency personnel to preside at oral conferences. The "explantory" value of the conference may be enhanced if it is conducted by the person who made the initial assessment. But the real or apparent danger of self-vindication may induce an agency to designate an employee not previously connected with the case to conduct the interview. This decision will inevitably turn on other factors, as well, such as the agency's resource constraints and degree of centralization. MSHA's policy of centralized assessment followed by decentralized conferences appears to be a very effective resolution of competing values.[647] There may be some loss of consistency and explanatory utility be separating the assessment and the conference functions, but the system enables MSHA to combine the advantages of centralized assessment with convenienty located conferences and minimizes the danger of self-vindication.

An important question concerning the design of an informal mitigation process is whether agency employees involved in initial review of mitigation requests should be permitted to engage in settlement negotiations with an alleged offender. Giving such employees an unrestricted license to bargain explicity may produce unfortunate results. They may neglect their primary duty to ascertain the accuracy of the charge and the proper penalty level in favor of seeking quick settlement of cases. By displaying an early willingness to bargain, the agency may forever lose its chance to achieve an optimal settlement. The legitimacy and credibility of an agency official's mitigation "decision" may be undercut by his willingness to horse-trade.

These dangers suggest that it might be desirable to establish a structural distinction between "mitigation" and "compromise." An agency might, in other words, design the prehearing process to comprise two distinct stages.[648] The first stage would consist of the initial request for mitigation of of the proposed penalty. The agency employee who considers that request would consider only the substantive criteria specified by Congress or by the agency for determining whether the violation occurred and what penalty is necessary to promote regulatory goals. He would neither invite nor entertain any offer in settlement at a lower amount. If the respondent wished to make such an offer, he would be required to present it to a different, presumably superior, agency official authorized to consider such an offer and engage in explicit bargaining.

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[646] An agency official may be reluctant to engage explicitly in settlement negotiations in the presence of a recorder, of course. But the agency probably should, in any event, await the conclusion of a mitigation conference to suggest "counter offers" premised on an estimation of collection costs or litigation probabilities.

[647] *See* pp. 338–39 *supra.*

[648] Such a separation was implicit in the Coast Guard's former procedure. *See* p. 250 *supra.*

While such a separation may be desirable in principle, an inflexible requirement to that effect would be misconceived. Requiring "compromise" offers to be considered by a separate agency official will inevitably escalate the cost of and the delays inherent in the mitigation process. Most fundamentally, the assumed cleavage between factors appropriate to a "mitigation" decision and to a negotiated settlement is not sharp. As I have indicated earlier,[649] "ability to pay"—a classic "compromise" consideration—is also directly relevant to the primary deterrent objective of most penalties. Even such considerations as the costs and risks of collection relate significantly to regulatory effectiveness, since an agency with limited enforcement resources must often balance the severity and the frequency of its sanctions. Furthermore, measurement of collectibility is usually so uncertain as to raise doubts about its utility as a decisional criterion.[650]

There are, of course, independent reasons for a multi-staged informal mitigation process. Internal review provides a potentially useful check on the accuracy and objectivity of initial mitigation decisions and reduces the likelihood of wasteful enforcement litigation. Although the marginal utility of successive reviews undoubtedly falls off sharply, most agencies—especially those that depend on a highly decentralized mitigation process—should probably offer respondents at least one opportunity to seek higher-level review of a mitigation decision.

C. *Statements of Reasons and Use of Precedents*

Whenever an agency denies, in whole or in part, a written request to cancel or mitigate a penalty, the APA appears to require it to furnish a "statement of the grounds" for the denial.[651] Even if this procedure were not commanded by statute, it would ordinarily be in the agency's self interest since the value of the prehearing process as a means of facilitating settlement requires communication of the agency's position. Without giving its reasons for rejecting a request, the agency leaves the accused party with no additional basis for assessing the wisdom of litigating the matter. Furthermore, a statement of reasons promotes the independent "explanatory" purpose of procedural fairness.

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[649] *See* p. 303 *supra*.

[650] *See* pp. 304–06 *supra*.

[651] 5 U.S.C. § 555(e) (1976). *See, e.g.,* Childs v. United States Board of Parole, 511 F.2d 1270 (D.C. Cir. 1974) (denial of parole). *Cf.* Dunlop v. Bachowski, 421 U.S. 560, 573 (1975) (statement of reasons by Secretary of Labor for refusal to bring suit to set aside labor union elections required by organic statute). *But see* Cleveland Trust Co. v. United States, 421 F.2d 475, 482 (6th Cir.), *cert. denied,* 400 U.S. 819 (1970) (IRS' denial of conference agreement requires no statement of reasons since matter subject to de novo trial).

In most settings, a written statement of reasons is vastly superior to an oral statement. The cost of preparing a written statement is probably only marginally greater than the cost of making a comparably well-prepared and well-reasoned oral statement. But the written statement, unlike its oral counterpart, is preserved for the record. It facilitates administrative review of the decision, post-audit quality control procedures, and use of the decision as a precedent for future cases. The preservation of written reasons for official decisions is often essential to the effective and just operation of a system in which the vast majority of cases is resolved at a relatively low level.[652] One of the reasons agencies find it difficult to articulate general prospective standards for the assessment and mitigation of penalty amounts is the claimed difficulty of anticipating and quantifying all the diverse factors bearing upon a proper decision. Preparation and retention of written decisions enables the agency to build an empirical base from which to generate a body of general standards.[653] Until the agency feels that it can generalize with confidence, it can at least use that body of decisions as a guide to future decisions.

The first step in constructing an informal system of precedents is to identify the decisions having precedential value and the weight to be given to them. The precedential use and weight of an informal agency action depends on the stage at which it is produced and the process followed. A decisionmaker should accord greater binding force to a prior decision if made by his superior than if made by the decisionmaker himself, and none at all if made by an equal or subordinate. A decision reached after reasoned argument by both sides should have greater force than an ex parte pronouncement. Consequently, final decisions on mitigation requests made by a superior agency official should be relied upon as guides to all future actions, whereas initial assessment or mitigation decisions deserve only very limited adherence.

The second requirement of a functioning system of precedents is that they be physically accessible to decisionmakers. To the extent that decisions are made centrally, this is rarely a problem. But in a system of decentralized decisionmaking it is important that actions having precedential use be communicated to the several regional offices. Reproduction and transmittal of entire case files present obvious problems of expense. In most cases an acceptable substitute is to disseminate written decisions themselves, so long as they fully describe the circumstances of the case. At a minimum, all final decisions on appeals to the central office should be transmitted to regional offices. The case for disseminating final decisions made at the regional level is less compelling. Since most cases are typically resolved at a low level, the cost of nationwide distribution will be much higher. Unlike central decisions, regional decisions have no precedential value in other regions. They may have some value as a basis for comparison or analogy, of course. But only if individual regional offices do not handle enough cases to generate an acceptable body of ''common law'' will that value justify the expense of routine dissemination.

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[652] *See* pp. 310–11 *supra*.

[653] *See generally* K. Davis, *supra* note 379 at 107–09.

The issue of physical accessibility blurs into the issue of practical usability. A body of decisions is useful as a guide for future action only if indexed in such a manner as to facilitate location of relevant material. Although most agencies surveyed in the course of this study claimed to rely on earlier decisions as precedents most of the time,[654] the evidence from the case studies raises doubts about the extent to which agencies have established a reliable system for identifying and locating relevant precedents.[655] Filing cases chronologically or alphabetically hardly assures the attainment of that objective. If agency personnel can index or file decisions by one criterion only, the best choice is probably the substantive regulatory or statutory provision implicated.

Far better, however, would be a case finding system which indexes cases by all significant substantive issues involved in the determination of liability and by the factors relied upon in calculation of the penalty. In this way, for example, an agency official confronted with a request for mitigation for alleged inability to pay could review prior decisions which expressly considered that issue, to identify the indicators of financial status used and the resulting adjustment made. Agencies with a substantial caseload should consider installing an automated indexing system. Indeed, any well-designed case management system should be able to be programmed to retrieve information on cases having any characteristic contained in the data base.[656] In the absence of an automated system, agencies should prepare a manual indexing system.

D. *Public Disclosure of Assessment and Mitigation Decisions*

The question remains to what extent an agency should make available to the public the written or recorded material from previous cases which

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[654] *See* p. 222 *supra.*

[655] *See, e.g.*, pp. 263–64 (FCC broadcast licensee forfeiture decisions), 282 (ICC forfeiture files) *supra.*

[656] The MSHA system represents an outstanding example. *See* note 429 *supra.*

which guides its staff in deciding pending cases. The Freedom of Information Act (FOIA)[657] imposes a general obligation on agencies to disclose records in their possession unless they fall within one of the Act's enumerated exceptions. Much of the material in files of pending or closed cases might be excluded under one or more of the Act's exclusions. For example, portions of files in open cases would probably qualify for exemption as "investigatory records."[658] Internal agency reports and communications prepared by investigators, analysts or lawyers for the benefit of decision-making personnel would be excludable as "intra-agency memorandums."[659] But those exemptions would not apply to communications in closed cases between an official of the agency and an alleged violator, including those which announce the agency's decision on a contested issue. Consequently, it is safe to conclude that an agency could ordinarily be required to disclose penalty assessment notices, decisions on initial requests to cancel or mitigate an assessment, decisions on review or reconsideration of such decisions, and settlement agreements.[660]

A right of general access to such material might, of course, have little practical value to its possessor unless he knows precisely what to ask for. Unless the agency's caseload is quite small, few potential users of the information will undergo the expense of sifting through a mass of undigested material. The recipient of an assessment notice has an obvious interest in knowing how the agency has handled cases presenting similar facts. Yet the amount at stake will rarely be great enough to justify a search. Private information services can sometimes fill the gap by spreading the cost of gathering and indexing information over many users. While this method has facilitated access to formal orders and rules of most agencies, it has not been a reliable means of enhancing access to informal rulings of subordinate agency personnel.[661]

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[657] 5 U.S.C. § 552 (Supp. 1977).

[658] 5 U.S.C. § 552(b)(7) (Supp. 1977). Congress amended FOIA in 1976 to tighten the "investigatory files" exemption. *See* NLRB v. Robbins Tire & Rubber Co., 98 S.Ct. 2311 (1978). Investigatory files may be excluded only for one of six specified reasons.

[659] 5 U.S.C. § 552(b)(5) (Supp. 1977). *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Renegotiation Bd. v. Grumman Aircraft Engrg. Corp., 421 U.S. 168 (1975); EPA v. Mink, 410 U.S. 73 (1973).

[660] Portions of such documents might contain material exempt from disclosure under other FOIA exclusions, such as that pertaining to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (Supp. 1977). *See, e.g.,* Continential Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975), *cert. denied,* 425 U.S. 971 (1976); Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971). But courts read these exclusions narrowly, *see, e.g.,* Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), and would in any event probably require disclosure with identifying details deleted. *See, e.g.,* Air Force v. Rose, 425 U.S. 352 (1976).

[661] A private information service has indexed and made publicly available letter rulings of the IRS disclosed pursuant to Tax Analysts & Advocates v. IRS, 405 F. Supp. 1065 (D.D.C. 1975).

FOIA does impose an affirmative obligation on agencies to prepare indexes of certain kinds of disclosable material, including "final opinions . . . made in the adjudication of cases."[662] The question of when an agency statement constitutes a "final opinion" is not an easy one to answer. An opinion accompanying a decision by an agency official, not reversible at a higher agency level, to dismiss a penalty assessment or claim would probably satisfy the "finality" requirement.[663] A decision to grant fully a request to mitigate a penalty to a specified amount would probably also meet that test. A decision denying a request for mitigation in whole or in part is not "final" in the same sense, since it does not, of its own force, terminate the matter. The alleged violator may have an opportunity to request reconsideration or review of that denial at a higher administrative level and, in any case, retains his statutory or constitutional right to an evidentiary hearing on contested issues and determination of the penalty.

An administrative denial may, however, be "final" in the weaker sense that it persuades the accused to drop the case and pay the penalty as assessed. Whether FOIA requires indexing of opinions which are "final" in that sense alone appears not to have been squarely answered. The Supreme Court's decision in *NLRB v. Sears, Roebuck & Company*[664] suggests that it does not. There the Court held that an order of the NLRB's General Counsel directing a Regional Director to dismiss an unfair labor practice complaint was "final," but that an order directing the Regional Counsel to file a complaint was not. The latter, the Court concluded, was not a "final opinion" because it did not effect a "final disposition" of the "case."[665] The same could be said of a denial of a prehearing mitigation request. For that reason, the Court held in the companion case of *Renegotiation Board v. Grumman Aircraft*[666] that staff memoranda to the Board recommending determination of excess profit claims are not "final."

The documents at issue in both cases, however, were communications between agency officials, not communications between an agency official and a private party. The issue of "finality" was presented in the context of applying the "intra-agency memorandum" exemption, not the indexing requirement. Public disclosure of an "opinion" contained in a communication to an alleged violator explaining the basis for denying a mitigation request presents none of the dangers to the "consultative functions of government"[667] addressed by the "intra-agency memorandum" exception. Even the opinion of a subordinate official can be "final" if not appealed to a higher administrative level. Although a denial of mitigation does not operate directly to deprive an accused of property or even foreclose de novo review of all issues presented at a subsequent stage, it has some "operative effect."[668] That is, it closes off an avenue of immediate relief from exposure to further prosecution. In the *Sears* case, the Supreme Court conceded that a decision to file an unfair labor practice complaint has "operative effect" in the sense that it "permits litigation before the Board."[669] The denial of a structured opportunity afforded by the agency to dispose of penalty cases without hearing has a similar impact.

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[662] 5 U.S.C. § 552(a)(2)(A) (Supp. 1977).

[663] *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

[664] 421 U.S. 132 (1975).

[665] 421 U.S. at 160.

[666] 421 U.S. 168 (1975).

[667] EPA v. Mink, 410 U.S. 73, 87 (1973), quoting from Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct.Cl. 1958) (Reed, J).

Even if FOIA did not require agencies to index, as well as make publicly available, its "opinions" granting or denying requests for cancellation or mitigation of civil money penalties, they should ordinarily do so. Certainly, if the value of using past decisions to guide future decisions is great enough to justify creating an indexing system in the first place, it should be made available to the public as well as agency staff. Refusal to disclose the index simply discourages the use of information otherwise publicly available except by those with sufficient resources to conduct a general search. If the use of precedents will enhance the fairness and accuracy of the agency's informal decisional processes, they should be available to both sides in the contest.

Previous decisions by agency personnel do not, of course, bind future decisionmakers. Access to decisions gives respondents no right to any particular outcome. But it does give them a legitimate claim to an explanation for any failure by an agency decisionmaker to follow a previous decision. Otherwise, the previous decisions exert no useful guiding force at all and public access to them is a charade. Agency officials may resist public disclosure of individual decisions for reasons similar to those advanced to block revelation of general standards.[670] But those arguments carry no more conviction in this context than they did there.

XIV. CONCLUSION: MODELS OF DECISIONMAKING UNDER CONSTRAINTS

There are risks inherent in using an atomistic approach to the evaulation of any system, including a process for enforcing regulatory commands through imposition of civil money penalties. A segmented analysis can overlook important interrelationships among system components and may undervalue the impact of constraints operating in actual situations. Individual procedural elements, examined in isolation, are too easily pushed to an ideal level of formality without sufficient concern for their costs or the efficacy of alternatives. While I have attempted throughout this report to call attention to relationships among elements of the enforcement process, the foregoing discussion is necessarily more of a catalog of particularistic recommendations than a coherent blueprint for one or more enforcement models. While that objective may well be excessively ambitious, given the enormous variety of regulatory objectives pursued by federal agencies, I have attempted in this concluding section to suggest the lines along which such a blueprint could be drawn.

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[668] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 158 n. 25, 160 (1975).

[669] 421 U.S. at 160.

[670] *See* pp. 306–10 *supra*.

The problem for the architect of an enforcement process is to select procedural and operational elements which maximize the attainment of desired objectives within existing constraints. The most obvious constraint on the design of a civil penalty system is fiscal. Agencies have limited budgetary resources to devote to the processing and handling of cases. Most agencies concede that they investigate and prosecute only a fraction of all the violations that occur. The "technology" of detection and investigation imposes relatively inflexible limits on the caseload they can generate. The cost of various explanatory and participatory procedures forces trade-offs between the number of generated cases they can prosecute and the amount of attention they can give to each prosecuted case. The necessity for giving individualized attention to each case is another crucial constraint. Effective motivation of private conduct may, in some contexts, require the imposition of a penalty individually tailored to the circumstances of the offense and the offender. The presence of a powerful compensatory objective may have the same consequence. Regardless of the regulatory purpose, some populations of regulated persons may exhibit an unusually high propensity to litigate. Finally, of course, the statutory allocation of decisional authority among the regulatory agency, the Department of Justice, and the courts imposes constraints on the agency's choice of procedure.

An enforcement process serves several possible objectives: guidance to the public, specific explanation to the accused, opportunity for participation, accuracy of fact-finding, and consistency of outcomes. Each can be accomplished by a variety of techniques: guidance, by general rules or by individual advice or warnings; explanation and participation, by written or oral, one-way or interactive, communications; accuracy, by inspections, tests, arguments, or confrontation; consistency, by rules, precedents, training, appeals or audits. Rarely can an agency pursue all of these objectives to the same degree or adopt all of the techniques available for their realization. External constraints force choice and often narrow the range of choice. In making such choices, an agency must be sensitive to the trade-offs available. Vigorous pursuit of one objective can sometimes provide an acceptable substitute for another. The more specific and effective the guidance afforded by the agency to potential violators, the less compelling is the need to provide separate explanation to an accused violator. A reduction in decisional consistency may be excused more easily if the accuracy of fact-finding and degree of participation by the accused are maintained at a high level. By the same token, some elements of an enforcement process can serve several objectives simultaneously. Establishment of written penalty standards, for example, directly promotes consistency of decision, facilitates explanation, participation and accuracy of fact-finding by focusing effort on relevant issues, and, if published, provides guidance for primary conduct.

One can combine components of an enforcement process into an enormous variety of hypothetical models. It is not necessary, of course, for an agency to choose only one model to the exclusion of all others. To some extent, it can structure a hierarchy of procedures, ranging from the simple to the complex, for different kinds of cases or successive stages of a case. In a sense, this is inevitable in this context, since, as I have concluded, any procedure for the imposition of a civil money penalty must include an opportunity for an evidentiary hearing on disputed factual issues. But the importance of choice is not, for that reason, diminished. The "informal" process utilized by the agency will have crucial consequences for the quality of justice actually dispensed by it. With this in mind, I have identified three common scenarios for the administrative assessment and imposition of civil money penalties. In each, I have attempted to identify the major operational constraints and to outline a model enforcement process responsive to those constraints.

A. *Model I*

The first scenario is the small-penalty case. Most enforcement programs resulting in penalties below, say, $200 fall into this category. In this context, the dominant constraint is, of course, the amount of the penalty itself. When the amount at stake is small, neither the accused nor the agency will find it in their interest to devote much effort or expense to the individual case. The amount of the penalty, of course, is not necessarily the exclusive measure of the amount at stake in a case. The cost to the accused of correcting the offending condition or preventing future offenses may be considerably greater than the penalty itself. The agency, on the other hand, may view the benefit to the regulatory program of collecting even a small penalty as considerable. Such cases may better fit other procedural models. But in most cases it is probably safe to say that a very low penalty correlates with a low amount at stake for both parties. It is in that context that Model I is appropriate.

In order to maximize the efficiency and fairness of its enforcement effort in the low-penalty context, the agency should rely most heavily on written standards and inspectional procedures. It should define violations in such a way as to be susceptible to direct observation or measurement. A standard of strict liability is essential in order to eliminate disputes about knowledge or intent. The definition of liability should exclude conduct whose harmful nature can be determined only by consideration of total surrounding circumstances. The agency should establish a fixed schedule of penalties to be assessed for each violation. The agency's standards should either preclude mitigation altogether or permit mitigation only in specified amounts and for readily and objectively ascertainable reasons, such as lack of previous violations. The penalty notice should invite the respondent to reply in writing only. It should not invite requests to mitigate the penalty assessed except for enumerated reasons.

B. Model II

The highly mechanistic structure and extreme curtailment of participatory opportunities characteristic of Model I do not suit cases requiring some degree of individualization. For example, the agency may conclude that a simple uniform penalty cannot adequately serve an important regulatory objective, such as special deterrence or restitution. Or it may be dealing with a regulated population characterized by a relatively high propensity to contest assessments. Model II is designed for the common situation which combines a need for modest individualization with a severe resource constraint, resulting from the small size of the sums at stake. As a very rough approximation, this scenario has best application to regulatory programs in which penalties tend to fall within a "moderate" range—say, $200 to $2000.

In this setting, the agency may relax somewhat the mechanical approach to defining the offending conduct and the amount of the sanction. It should still strive to minimize sources of factual dispute by making liability turn on readily observable or quantifiable conduct. Definitions of liability should rest on a standard of strict liability or, at least, an empirically and intuitively defensible presumption of intent. The agency should specify either a schedule of "ideal" penalty amounts or a relatively narrow range of penalties for each violation. It should limit the grounds for mitigation and specify methods of measuring each one. The agency should encourage written requests for cancellation or mitigation except to the extent that disputes about primary facts or questions of interpretation are reasonably common and many members of the regulated population are unlikely to be able to explain their position well in writing. In that case, the agency should afford an opportunity for oral conference at a location convenient to the accused, before a relatively impartial agency official empowered to cancel or modify the assessment. The accused should have a right to be represented by an advisor and, if necessary, to bring witnesses, but not to confront or cross-examine agency witnesses. The official responsible for mitigation decisions should give a brief written statement of the reasons for his decision specifically addressing all contested issues. These statements of reasons should be retained within the field office and indexed for easy reference in future cases involving similar facts.

C. Model III

Where the end for individualized decisionmaking is especially great and the resource constraints less severe, a third model is appropriate. To some extent, high penalty amounts necessarily imply a greater need to individualize since the higher the potential penalty, the greater the range of potential motivational impact. Ability to pay becomes a significant factor as penalty levels move into the thousands of dollars. The need to individualize need not relate solely to penalty amounts, however. The substantive standard being enforced may be necessarily open-textured due to the difficulty of anticipating all of the circumstances which determine the social harmfulness of particular conduct. Attainment of the regulatory objective may require a penalty finely tuned to the precise circumstances of the case. Where the agency's resources are sufficient to adopt a more individualized process, a third model is appropriate.

This model permits—and responds to a need—relaxation of the mechanical quality of standards needed for Models I and II. Penalty-determination criteria are still required, but mathematical formulae are, by hypothesis, inappropriate here. Because the penalty assessment necessarily involves considerable prosecutorial discretion, one or a small number of officials at the central office should specialize in that function. Officials may assess penalties at the maximum unless the investigation clearly established the presence of mitigating factors. The assessment notice should invite the respondent to reply in writing or to request an informal hearing involving an opportunity to present testimony by witnesses and to review the written file of the case. The file or the presiding official should identify the factors and the evidence upon which the assessment officer determined liability and calculated the penalty. The decisionmaker should accompany his decision with a written opinion. The accused should have the right to submit a written appeal or request for settlement to a supervisory official. A written statement of reasons should accompany a decision on the merits of an appeal. Statements of reasons prepared at both primary and appellate levels should be indexed and made available to the public and to all agency officials authorized to grant mitigation requests. Mitigation officials should either follow a previous decision cited by a respondent or explain their reasons for deviating from it.

D. Conclusion

The three models sketched above are by no means intended to exhaust possible procedural models for imposing money penalties. Agencies, like the Federal Trade Commission or the Consumer Product Safety Commission, whose caseload consists of a small number of cases often involving very large penalty claims and fiercely disputed issues may require different strategies. But such programs are comparatively rare. The vast majority of federal regulatory programs involve relatively small penalties assessed often in large numbers for common and repetitive offenses. Although all alleged violators have a right to an evidentiary hearing of disputed issues at some stage, that right is rarely available as a practical matter and still less frequently invoked. The efficacy of the agency's enforcement efforts and the quality of the justice it dispenses therefore depend on the informal procedures it has created to dispose of routine cases. It is inevitable that the constraints under which agencies must operate require an accommodation with an ideal level of performance. But the extent of that accommodation nonetheless remains a direct consequence of deliberate agency choice. The purpose of this report has been to examine the parameters of that choice and to suggest ways in which its exercise can enhance the quality of administrative justice.

EXHIBIT 1A

CIVIL MONEY PENALTY COLLECTIONS, BY FEDERAL DEPARTMENT AND ADMINISTRATIVE UNIT, 1974–1977[1]

	1974[3]		1975		1976		1977	
Department[2]	Cases[4]	Amount[5]	Cases	Amount	Cases	Amount	Cases	Amount
Agriculture								
AMS (f, a)	36	34883	44	101215	58	62850	78	843953
ASCS (f)	NA[6]	511878	NA	426409	NA	560359	NA	545302
APHIS	39^{e}	12755	20^{e}	10857	11^{e}	6867	47^{e}	29079
Commerce								
BEA	0	0	0	0	0	0	0	0
BOC	0	0	0	0	0	0	0	0
ITA (a)	5	5230	6	32600	7	36000	39	61350
MA	233	14200	95	7825	99	6510	103	5300
NOAA (a)	8	8800	18	14900	25	56800	28	82425
Energy	0	0	0	0	0	0	0	0
FERC	0	0	0	0	0	0	0	0
HEW	0	0	0	0	0	0	0	0
HUD[7]	–	–	–	–	–	–	–	–
Interior								
FWS (f, a)	NA	NA	NA	NA	NA	NA	631	61125
OSMRE[7]	–	–	–	–	–	–	–	–
Justice								
DEA (a)	NA	NA	8	1500000	15	2625000	17	3915000
INS								
Labor								
ESA (f, a)	NA	NA	211	11400	682	475275	1479	1463969
LMSA	0	0	0	0	0	0	0	0
MSHA	11150^{e}	4700000	21195^{e}	9900000^{e}	19281	8528321	18822	12782660
OSHA (a)[8]	292069	6971651	318792	8245496	380356	12449706	181942	10561557
State	0	0	0	0	0	0	0	0
Transportation								
CG	4451	1828668	4597	1688656	4589	1312509	3624	562295
FAA	1672	681311	1725	639425	1281	713524	1326	544639
FHA	69^{e}	279036^{e}	69^{e}	279036^{e}	69^{e}	279036^{e}	69^{e}	279036^{e}
FRA	NA	NA	NA	NA	26	97324	230	3287632
NHTSA (f)	43	264150	31	184200	23	53600	17	73000
RSPD	0	0	10	4750	3	6800	NA	NA
SLSDC (f)	4	1700	2^{e}	650	7^{e}	2850	9^{e}	4000
Treasury								
CS (f, a)	NA	NA	166794	15668327	168780	13887924	150915	13693823
COC	NA	NA	NA	NA	NA	NA	NA	NA
IRS	NA	NA	NA	NA	NA	NA	NA	NA
Totals	309779	\$15314262	513617	\$38715746	575312	\$41161255	359376	\$43796145

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[1] Source: replies to ACUS questionnaire, plus follow-up interviews in selected cases, February–August 1978.

[2] See Exhibit 9 for glossary of abbreviations.

[3] Year shown is calendar year, except in the case of departments or units designated by the letter "f", in which case, fiscal year is used.

[4] "Cases" refers to number of cases closed during the indicated period, except in the case of departments or units designated by the letter "a", in which case "cases" means number

EXHIBIT 1B

CIVIL MONEY PENALTY COLLECTIONS, BY INDEPENDENT FEDERAL AGENCY, 1974–1977[1]

	1974[3]		1975		1976		1977	
Agency[2]	Cases[4]	Amount[5]	Cases	Amount	Cases	Amount	Cases	Amount
CAB (f)	28	478000	41	577594	39	1321925	28	435350
CFTC (f)	–	–	–	–	1	3000	5	354000
CPSC (f,a)	–	–	–	–	2	125000	1	90000
EPA	283[e]	719454[e]	1320[e]	999370[e]	2801[e]	1237819[e]	NA	NA
FCC[7]	1214	355091	1518	333818	2326	272485	1691	191123
FHLBB	535	1063899	318	785034	473	937468	610	1475758
FMC (f)	12	138000	23	178000	31	280000	NA	NA
FTC	4	188500	12	306291	6	1221000	14	665000
ICC	461	1175225	368	1528733	363	1404097	NA	NA
NRC (a)	17	100370	15	95150	13	174350	13	140750
SBA	7[e]	NA	7[e]	NA	7[e]	NA	7[e]	NA
USPS	22[e]	139802	15[e]	95670	125[e]	140659	78[e]	134665
Totals: Independent Agencies	2583	$4358341	3637	$4899650	6187	$7117839	2447	$3486646
Totals: All Federal Agencies	312362	$19672603	517254	$43615396	581499	$48279094	361823	$52282783

1. Source: replies to ACUS questionnaire, plus follow-up interviews in selected cases, Februrary–August 1978.
2. See Exhibit 9 for glossary of abbreviations.
3. Year shown is calendar year, except in the case of agencies designated by the letter "f", in which case, fiscal year is used.
4. "Cases" refers to number of cases closed during the indicated period, except in the case of agencies designated by the letter "a", in which case "cases" means number of cases in which a penalty was assessed. The letter "e" indicates the caseload figure has been estimated from aggregate data not broken down by year.
5. "Amount" means amount collected or (if a letter "a" is indicated) amount assessed, as the case may be. The letter "e" indicates that the amount has been estimated.
6. Not available.
7. One of 3 bureaus reporting on fiscal year basis.

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of cases in which a penalty was assessed. The letter "e" indicates the caseload figure has been estimated from aggregate data not broken down by year.

5. "Amount" means amount collected or (if letter "a" is indicated) amount assessed, as the case may be. The letter "e" indicates that the amount has been estimated.
6. Not available.
7. Civil money penalty statutes not in force until after 1977.
8. The number shown under the "cases" column is the number of violations of occupational health and safety standards for which penalties were assessed.

EXHIBIT 2A

Average Annual Civil Money Penalty Caseload and Collections, by Federal Department and Administrative Unit, Various Reporting Periods[1]

		Average Per Year		
Department[2]	Reporting Years	Number of Cases	Amount Collected ($)	Collection Per Case ($)
Agriculture				
AMS	1974–1977	54	260725	4828
ASCS	1974–1977	NA	510987	NA
APHIS	1974–1977	27	14890	551
Commerce				
BEA	1973–1977	0	0	–
BOC	1973–1977	0	0	–
ITA	1973–1977	13	33540	2580
MA	1974–1977	132	8459	64
NOAA	1974–1977	20	40756	2038
Energy	1973–1977	0	0	0
FERC				
HEW	1973–1977	0	0	1
HUD		–	–	–
Interior				
FWS	1977	631	61125	97
OSMRE		–	–	–
Justice				
DEA	1975–1977	13	2680000	206154
INS				
Labor				
ESA	1975–1977	789	650215	824
LMSA	1973–1977	0	0	0
MSHA	1976–1977	19052	10655490	559
OSHA	1974–1977	293290	9557102	33
State				
Transportation				
CG	1973–1977	4210	1493897	355
FAA	1973–1977	1328	505472	381
FHA	1973–1977	69	279036	4044
FRA	1976–1977	128	1692478	13233
NHBA	1973–1977	31	142070	4583
RSPD	1975–1976	65	5675	873
SLSDC	1973–1977	5	2290	458
Treasury				
CS	1975–1977	170167	15553620	97
COC	NA	NA	NA	NA
IRS	NA	NA	NA	NA

[1] Source: see Exhibit 1A.

[2] See Exhibit 9 for glossary of abbreviations.

EXHIBIT 2B

AVERAGE ANNUAL CIVIL MONEY PENALTY CASELOAD AND COLLECTIONS, BY INDEPENDENT FEDERAL AGENCY, VARIOUS REPORTING PERIODS[1]

Agency[2]	Reporting Years	Average Annual Number of Cases	Average Annual Amount Collected ($)	Average Annual Collection Per Case ($)
CAB	1973–1977	26	416754	16029
CFTC	1976–1977	35	179000	57143
CPSC	1976–1977	15	107500	71667
EPA	1974–1976	1468	985543	671
FCC	1974–1977	1687	288130	171
FHLBB	1973–1977	495	1012254	2045
FMC	1973–1977	17	211387	12435
FTC	1974–1977	9	595195	66133
ICC	1972–1976	445	1457507	3275
NRC	1974–1977	15	127655	8510
SBA	1973–1977	7	NA	NA
USPS	1974–1977	60	127708	2128

1. Source: see Exhibit 1B.
2. See Exhibit 9 for glossary of abbreviations.

EXHIBIT 3A

FEDERAL STATUTORY CIVIL MONEY PENALTY PROVISIONS, ASSESSMENT AND MITIGATION AUTHORITY, BY ENFORCING DEPARTMENT[1]

		Assessment Authority			
Department[2]	Total[3]	Court[4]	Agency	Mitigation Authority[5]	Assessment Criteria[6]
Agriculture	12	4	8	2	4
AMS	9	4	5	1	3
ASCS	2	0	2	0	0
APHIS	1	0	1	1	1
Commerce	13	2	11	10	3
BEA	1	1	0	0	0
BOC	2	1	1	1	1
ITA	1	0	1	1	0
MA	1	0	1	1	0
NOAA	8	0	8	7	2
Energy	1	0	1	1	0
FERC	1	0	1	1	0
HEW	2	2	0	2	1
HUD	1	1	0	1	0
Interior	5	0	5	5	3
FWS	4	0	4	4	2
OSMRE	1	0	1	1	1
Justice	15	15	0	13	0
DEA	1	1	0	1	0
INS	14	14	0	12	0
Labor	13	1	12	7	6
ESA	6	1	5	6	1
LMSA	1	0	1	0	0
MSHA	1	0	1	1	1
OSHA	5	0	5	0	4
State	1	0	1	1	0
Transportation	125	100	25	112	11
CG	106	93	13	103	2
FAA	2	0	2	2	1
FHA	2	1	1	1	1
FRA	7	5	2	2	1
NHTSA	5	1	4	1	4
RSPD	2	0	2	2	2
SLSDC	1	0	1	1	0
Treasury	110	44	66	104	3
CS	41	41	0	41	0
COC	6	1	5	0	3
IRS	63	2	61	63	0
Totals	298	169	129	258	3 1

1. Source: replies to ACUS questionnaire; United States Code (*passim*).
2. See Exhibit 9 for glossary of abbreviations.
3. Total number of statutory civil penalty provisions enforced by indicated administrative unit. Statutes enforced by more than one unit count more than once.
4. Includes statutes which are silent on the locus of assessment authority. *See* 28 U.S.C. § 2461(a) (1970).
5. Express power conferred on agency to mitigate or compromise penalty.
6. Criteria for setting penalty amount specified in statute.

EXHIBIT 3B

FEDERAL STATUTORY CIVIL MONEY PENALTY PROVISIONS, ASSESSMENT AND MITIGATION AUTHORITY, BY INDEPENDENT AGENCIES[1]

		Assessment Authority			
Agency[2]	Total[3]	Court[4]	Agency	Mitigation Authority[5]	Assessment Criteria[6]
CAB	1	0	1	1	0
CFTC	2	0	2	0	2
CPSC	2	1	1	1	1
EPA	15	9	6	3	6
FCC	14	12	2	14	2
FDIC	2	0	2	0	2
FHLIBB	8	6	2	1	1
FMC	7	7	0	7	0
FRB	4	0	4	0	4
FSLIC	2	0	2	0	2
FTC	4	3	1	3	1
ICC	11	11	0	0	0
NCUA	1	0	1	0	1
NRC	1	0	1	1	0
SBA	2	2	0	2	1
USPS	2	0	2	2	0
Totals: Independent Agencies	78	51	27	35	23
Totals: All Federal Agencies	376	220	156	293	54

[1] Source: replies to ACUS questionnaire; United States Code (*passim*).

[2] See Exhibit 9 for glossary of abbreviations.

[3] Total number of statutory civil penalty provisions enforced by indicated administrative unit. Statutes enforced by more than one unit count more than once.

[4] Includes statutes which are silent on the locus of assessment authority. *See* 28 U.S.C. § 2461(a) (1970).

[5] Express power conferred on agency to mitigate or compromise penalty.

[6] Criteria for setting penalty amount specified in statute.

EXHIBIT 4A

"AGENCY-ASSESSMENT" CIVIL MONEY PENALTY PROVISIONS, REQUIRED STATUTORY PROCEDURE, BY ENFORCING DEPARTMENT[1]

	Required Agency Procedure			
Department[2]	None Specified	Notice	Notice and Hearing	Formal Hearing[3]
Agriculture	3	0	3	2
AMS	1	0	2	2
ASCS	2	0	0	0
APHIS	0	0	1	0
Commerce	2	0	7	2
BEA	0	0	0	0
BOC	1	0	0	0
ITA	0	0	1	0
MA	1	0	0	0
NOAA	0	0	6	2
Energy	0	0	1	0
FERC	0	0	1	0
HEW	0	0	0	0
HUD	0	0	0	0
Interior	0	0	3	2
FWS	0	0	3	1
OSMRE	0	0	0	1
Justice	0	0	0	0
DEA	0	0	0	0
INS	0	0	0	0
Labor	1	0	3	8
ESA	0	0	3	2
LMSA	1	0	0	0
MSHA	0	0	0	1
OSHA	0	0	0	5
State	0	0	1	0
Transportation	13	2	10	0
CG	9	1	3	0
FAA	0	0	2	0
FHA	0	0	1	0
FRA	1	0	1	0
NHTSA	1	1	2	0
RSPD	1	0	1	0
SLSDC	1	0	0	0
Treasury	16	47	0	3
CS	0	0	0	0
COC	2	0	0	3
IRS	14	47	0	0
Totals	35	49	27	1 7

1. Source: replies to ACUS questionnaire; United States Code (*passim*).
2. See Exhibit 9 for glossary of abbreviations.
3. Trial-type hearing on the record.

EXHIBIT 4B

"AGENCY-ASSESSMENT" CIVIL MONEY PENALTY PROVISIONS, REQUIRED STATUTORY PROCEDURE, BY INDEPENDENT AGENCIES[1]

	Required Agency Procedure			
Department[2]	None Specified	Notice	Notice and Hearing	Formal Hearing[3]
CAB	0	0	1	0
CFTC	0	0	1	1
CPSC	1	0	0	0
EPA	0	0	4	2
FCC	0	1	0	1
FDIC	0	0	0	2
FHLBB	1	0	0	1
FMC	0	0	0	0
FRB	0	0	0	4
FSLIC	0	0	0	2
FTC	1	0	0	0
ICC	0	0	0	0
NCUA	0	0	0	1
NRC	0	0	1	0
SBA	0	0	0	0
USPS	1	0	1	0
Totals: Independent Agencies	4	1	8	14
Totals: All Federal Agencies	39	50	35	31

1. Source: replies to ACUS questionnaire; United States Code (*passim*).
2. See Exhibit 9 for glossary of abbreviations.
3. Trial-type hearing on the record.

EXHIBIT 5A

Federal Statutory Civil Money Penalty Provisions, Type of Penalty and Alternative Sanctions by Enforcing Department[1]

	Type of Penalty		Alternative Sanctions[5]			
Department[2]	Fixed[3]	Variable[4]	Criminal	Injunctive	License Revocation	Seizure of Property
Agriculture	4	8	3		4	2
AMS	2	7	2	7	4	1
ASCS	2	0	0	6	0	0
APHIS	0	1	1	0	0	1
Commerce	1	12	8	1	2	9
BEA	0	1	0	0	0	0
BOC	0	2	0	0	0	0
ITA	0	1	1	0	1	1
MA	1	0	0	0	0	0
NOAA	0	8	7	1	1	8
Energy	0	1	1	0	0	0
FERC		1	1	0	0	0
HEW	0	2	1	1	0	1
HUD	0	1	1	1	0	0
Interior	0	5	5	1	3	3
FWS	0	4	4	0	2	3
OSMRE	0	1	1	1	1	0
Justice	13	2	1	0	1	3
DEA	0	1	1	0	1	0
INS	13	1	0	0	0	3
Labor	3	10	9	6	0	1
ESA	3	3	2	4	0	1
LMSA	0	1	1	0	0	0
MSHA	0	1	1	1	0	0
OSHA	0	5	5	1	0	0
State	0	1	1	0	1	1
Transportation	63	62	30	1 5	5	38
CG	61	45	21	3	3	36
FAA	0	2	2	1	0	1
FHA	0	2	2	2	1	0
FRA	1	6	1	3	1	0
NHTSA	1	4	2	4	0	0
RSPD	0	2	1	2	0	0
SLSDC	0	1	1	0	0	1
Treasury	98	12	75	2	0	104
CS	36	5	12	0	0	41
COC	1	5	0	2	0	0
IRS	61	2	63	0	0	63
Totals	182	116	135	34	16	162

1. Source: replies to ACUS questionnaire; United States Code (*passim*).
2. See Exhibit 9 for glossary of abbreviations.
3. Penalty specified at fixed dollar (or otherwise determinable) amount.
4. Penalty amount constrained by statutory maximum or range.
5. Alternative sanctions provided by statute for the same or substantially the same conduct subject to the civil money penalty.

EXHIBIT 5B

FEDERAL STATUTORY CIVIL MONEY PENALTY PROVISIONS, TYPE OF PENALTY AND ALTERNATIVE SANCTIONS BY ENFORCING INDEPENDENT AGENCIES[1]

	Type of Penalty		Alternative Sanctions[5]			
Agency[2]	Fixed[3]	Variable[4]	Criminal	Injunctive	License Revocation	Seizure of Property
CAB	0	1	1	0	0	1
CFTC	0	2	1	2	2	0
CPSC	1	1	2	2	0	2
EPA	1	14	10	13	2	5
FCC	12	2	9	14	9	0
FDIC	0	2	0	0	0	0
FHLBB	1	5	2	5	2	1
FMC	1	6	0	0	1	0
FRB	0	4	0	0	0	0
FSLIC	0	2	0	0	0	0
FTC	0	4	2	3	0	0
ICC	4	7	4	9	9	0
NCUA	0	1	0	0	0	0
NRC	0	1	0	1	1	0
SBA	1	1	1	1	0	0
USPS	0	1	1	0	1	1
Totals: Independent Agencies	21	54	33	50	27	10
Totals: All Federal Agencies	203	170	168	84	43	172

1. Source: replies to ACUS questionnaire; United States Code (*passim*).
2. See Exhibit 9 for glossary of abbreviations.
3. Penalty specified at fixed dollar (or otherwise determinable) amount.
4. Penalty amount constrained by statutory maximum or range.
5. Alternative sanctions provided by statute for the same or substantially the same conduct subject to the civil money penalty.

EXHIBIT 6A

FEDERAL STATUTORY CIVIL MONEY PENALTY PROVISIONS, PENALTY IMPOSITION PROCEDURES USED BY ENFORCING DEPARTMENT[1]

		Hearing		
Department[2]	Written Reasons[3]	Informal[4]	Formal[5]	Administrative Appeal[6]
Agriculture	6	3	4	4
AMS	3	2	2	2
ASCS	2	0	2	2
APHIS	1	1	0	0
Commerce	8	3	6	9
BEA	0	0	0	0
BOC	0	0	0	0
ITA	0	0	1	1
MA	0	0	0	0
NOAA	8	3	5	8
Energy	1	0	1	1
FERC	1	0	1	1
HEW	0	0	0	0
HUD	0	0	0	0
Interior	5	1	4	3
FWS	4	1	3	3
OSMRE	1	0	1	0
Justice	0	0	0	0
DEA	0	0	0	0
INS	NA	NA	NA	NA
Labor	10	1	10	8
ESA	4	1	4	2
LMSA	0	0	0	0
MSHA	1	0	1	1
OSHA	5	0	5	5
State	0	1	0	0
Transportation	113	118	4	111
CG	106	106	0	106
FAA	2	1	1	1
FHA	2	2	1	1
FPA	1	6	1	1
NHTSA	1	2	1	1
RSPD	0	1	0	0
SLSDC	1	0	0	1
Treasury	107	63	3	82
CS	41	0	0	41
COC	3	0	3	0
IRS	63	63	0	41
Totals	250	190	32	218

1. Source: replies to ACUS questionnaire.

2. See Exhibit 9 for glossary of abbreviations.

3. Detailed written statement of reasons for final penalty assessment provided the alleged violator.

4. Number of penalty provisions with respect to which the department affords the respondent a right to an oral hearing before a department official or employee, but not on the record nor providing an opportunity for confrontation and cross-examination of witnessess.

5. Number of penalty provisions with respect to which the department affords the respondent a right to a trial-type hearing on the record.

6. Number of penalty provisions with respect to which the department affords the respondent a right to appeal a formal penalty assessment to a higher department authority.

EXHIBIT 6B

FEDERAL STATUTORY CIVIL MONEY PENALTY PROVISIONS, PENALTY IMPOSITION PROCEDURES USED BY INDEPENDENT AGENCIES[1]

		Hearing		
Department[2]	Written Reasons[3]	Informal[4]	Formal[5]	Administrative Appeal[6]
CAB	1	0	1	0
CFTC	2	0	2	2
CPSC	1	0	1	1
EPA	6	3	3	4
FCC	14	1	1	14
FDIC	2	0	2	0
FHLBB	2	0	0	2
FMC	0	7	0	0
FRB	4	0	4	0
FSLIC	2	0	2	0
FTC	0	0	0	0
ICC	0	0	0	0
NCUA	1	0	1	0
NRC	1	0	1	1
SBA	0	0	0	0
USPS	2	2	0	2
Totals: Independent Agencies	38	13	19	26
Totals: All Federal Agencies	288	203	51	244

[1] Source: replies to ACUS questionnaire.

[2] See Exhibit 9 for glossary of abbreviations.

[3] Detailed written statement of reasons for final penalty assessment provided the alleged violator.

[4] Number of penalty provisions with respect to which the agency affords the respondent a right to an oral hearing before an agency official or employee, but not on the record nor providing an opportunity for confrontation and cross-examination of witnessess.

[5] Number of penalty provisions with respect to which the agency affords the respondent a right to trial-type hearing on the record.

[6] Number of penalty provisions with respect to which the agency affords the respondent a right to appeal a formal penalty assessment to a higher agency authority.

EXHIBIT 7A

FEDERAL STATUTORY CIVIL MONEY PENALTIES USE OF PUBLISHED STANDARDS AND PRECEDENTS, BY ENFORCING DEPARTMENT[1]

	Published Standards[3]		Use of Precedents[4]	
Department[2]	Factors	Formula	Always	Sometimes
Agriculture	0	1	5	0
AMS	0	1	3	0
ASCS	0	0	2	0
APHIS	0	0	0	0
Commerce	9	0	6	3
BEA	0	0	0	0
BOC	0	0	0	0
ITA	1	0	1	0
MA	1	0	0	0
NOAA	7	0	5	3
Energy	0	0	1	0
FERC	0	0	1	0
HEW	0	0	0	0
HUD	0	0	0	0
Interior	4	1	5	0
FWS	4	0	4	0
OSMRE	0	1	1	0
Justice	0	0	0	0
DEA	0	0	0	0
INS	NA	NA	NA	NA
Labor	1	4	7	0
ESA	0	2	4	0
LMSA	0	1	1	0
MSHA	0	1	1	0
OSHA	1	0	1	0
State	0	0	0	0
Transportation	1	6	4	112
CG	0	0	0	106
FAA	0	0	2	0
FHA	0	0	0	2
FRA	0	6	1	0
NHTSA	0	0	1	4
RSPD	0	0	0	0
SLSDC	1	0	0	0
Treasury	41	41	3	63
CS	41	0	0	0
COC	0	0	3	0
IRS	0	41	0	63
Totals	56	53	31	178

1. Source: replies to ACUS questionnaire.

2. See Exhibit 9 for glossary of abbreviations.

3. Number of penalty provisions with respect to which the department has published standards for assessing or mitigating the penalty amount. "Factors" refers to the enumeration of decisional factors, beyond any statutory criteria, without assignment of weights to the factors. A "formula" is a set of standards capable of relatively objective application.

4. Number of penalty provisions with respect to which the department either "always" or "sometimes" uses written statements of reasons for assessment or mitigation decisions as precedents for subsequent decisions.

EXHIBIT 7B

FEDERAL STATUTORY CIVIL MONEY PENALTIES USE OF PUBLISHED STANDARDS AND PRECEDENTS, BY INDEPENDENT AGENCIES[1]

	Published Standards[3]		Use of Precedents[4]	
Agency[2]	Factors	Formula	Always	Sometimes
CAB	0	0	1	0
CFTC	0	0	2	0
CPSC	0	0	1	0
EPA	0	2	4	0
FCC	0	1	1	5
FDIC	0	0	2	0
FHLBB	0	1	1	0
FMC	7	0	0	0
FRB	0	0	4	0
FSLIC	0	0	2	0
FTC	0	0	0	0
ICC	0	0	0	0
NCUA	0	0	1	0
NRC	0	1	1	0
SBA	0	0	0	0
USPS	0	2	0	2
Totals: Independent Agencies	7	7	20	7
Totals: All Federal Agencies:	63	60	51	185

1. Source: replies to ACUS questionnaire.

2. See Exhibit 9 for glossary of abbreviations.

3. Number of penalty provisions with respect to which the agency has published standards for assessing or mitigating the penalty amount. "Factors" refers to the enumeration of decisional factors, beyond any statutory criteria, without assignment of weights to the factors. A "formula" is a set of standards capable of relatively objective application.

4. Number of penalty provisions with respect to which the agency either "always" or "sometimes" uses written statements of reasons for assessment or mitigation decisions as precedents for subsequent decisions.

EXHIBIT 8A

FEDERAL STATUTORY CIVIL MONEY PENALTY PROVISIONS, LOCUS OF ASSESSMENT AUTHORITY AND QUALITY CONTROL SYSTEMS BY ENFORCING DEPARTMENT[1]

	Locus of Initial Assessment Authority[3]		Use of Precedents[4]	
Department[2]	Decentralized	Centralized	Appeal	Audit
Agriculture	2	10	4	0
AMS	0	9	2	0
ASCS	2	0	2	0
APHIS	0	1	0	0
Commerce	8	5	9	9
BEA	0	1	0	0
BOC	0	2	0	0
ITA	0	1	1	0
MA	1	0	0	1
NOAA	7	1	8	8
Energy	0	1	1	0
FERC	0	1	1	0
HEW	0	2	0	0
HUD	0	1	0	0
Interior	1	4	3	1
FWS	1	3	3	1
OSMRE	0	1	0	0
Justice	0	1	0	0
DEA	0	1	0	0
INS	NA	NA	NA	NA
Labor	2	7	5	3
ESA	0	6	2	2
LMSA	1	0	1	1
MSHA	0	1	1	0
OSHA	1	0	1	0
State	0	1	0	0
Transportation	106	19	112	2
CG	106	0	106	0
FAA	0	2	1	0
FHA	0	2	1	0
FRA	0	7	2	1
NHTSA	0	5	1	0
RSPD	0	2	0	0
SLSDC	0	1	1	1
Treasury	104	6	82	63
CS	41	0	41	0
COC	0	6	0	0
IRS	63	0	41	63
Totals	223	57	216	78

1. Source: replies to ACUS questionnaire.

2. See Exhibit 9 for glossary of abbreviations.

3. Number of penalty provisions with respect to which the initial assessment is made on a decentralized or a centralized basis within the agency structure.

4. Number of penalty provisions with respect to which the agency undertakes to assess the quality (accuracy, consistency and conformity to agency policy) of staff assessment or mitigation decision by: (1) relying on administrative appeals to higher agency authority, (2) conducting systematic periodic audits of at least a random sample of assessment actions, or (3) both.

EXHIBIT 8B

Federal Statutory Civil Money Penalties, Locus of Assessment Authority and Quality Control Systems, by Independent Agencies[1]

	Locus of Initial Assessment of Authority[3]		Quality Control[4]	
Agency[2]	Decentralized	Centralized	Appeal	Audit
CAB	0	1	0	0
CFTC	0	2	2	0
CPSC	0	2	1	0
EPA	6	9	4	0
FCC	1	13	14	1
FDIC	0	2	0	0
FHLBB	0	8	1	0
FMC	0	7	0	0
FRB	0	4	0	0
FSLIC	0	2	0	0
FTC	0	4	0	0
ICC	11	0	0	0
NCUA	0	1	0	0
NRC	0	1	1	0
SBA	1	1	0	0
USPS	2	0	2	0
Totals: Independent Agencies	21	57	25	1
Totals: All Federal Agencies	244	114	241	79

1. Source: replies to ACUS questionnaire.

2. See Exhibit 9 for glossary of abbreviations.

3. Number of penalty provisions with respect to which the initial assessment is made on a decentralized or a centralized basis within the agency structure.

4. Number of penalty provisions with respect to which the agency undertakes to assess the quality (accuracy, consistency and conformity to agency policy) of staff assessment or mitigation decision by: (1) relying on administrative appeals to higher agency authority, (2) conducting systematic periodic audits of at least a random sample of assessment actions, or (3) both.

EXHIBIT 9

Glossary of Abbreviations of Federal Departmental Units and Independent Agencies

AMS: Agricultural Marketing Service
APHIS: Animal and Plant Health Inspection Service
ASCS: Agricultural Stabilization and Conservation Service
BEA: Bureau of Economic Analysis
BOC: Bureau of the Census
CAB: Civil Aeronautics Board
CFTC: Commodity Futures Trading Commission
CG: Coast Guard
COC: Comptroller of the Currency
CPSC: Consumer Product Safety Commission
CS: Customs Service
DEA: Drug Enforcement Administration
EPA: Environmental Protection Agency
ESA: Employment-Standards Administration
FAA: Federal Aviation Administration
FCC: Federal Communications Commission
FDIC: Federal Deposit Insurance Corporation
FERC: Federal Energy Regulatory Commission
FHA: Federal Highway Administration
FHLBB: Federal Home Loan Bank Board
FMC: Federal Maritime Administration
FRA: Federal Railroad Administration
FRB: Federal Reserve Board
FSLIC: Federal Savings and Loan Insurance Corporation
FTC: Federal Trade Commission
FWS: Fish and Wildlife Service
HEW: Department of Health, Education and Welfare
HUD: Department of Housing and Urban Development
ICC: Interstate Commerce Commission
INS: Immigration and Naturalization Service
IRS: Internal Revenue Service
ITA: Industry and Trade Administration
LMSA: Labor-Management Services Administration
MA: Maritime Administration
MSHA: Mine Safety and Health Administration[1]
NCUA: National Credit Union Administration
NHTSA: National Highway Transportation Safety Administration
NOAA: National Oceanic and Atmospheric Administration
NRC: Nuclear Regulatory Commission
OSHA: Occupational Safety and Health Administration[2]
OSMRE: Office of Surface Mining Reclamation and Enforcement
RSPD: Research and Special Programs Directorate
SBA: Small Business Administration
SLSDC: St. Lawrence Seaway Development Corporation
USPS: United States Postal Service

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1. For purposes of Exhibits 1A through 8B, "MSHA" includes the Mine Safety and Health Review Commission.

2. For purposes of Exhibits 1A through 8B, "OSHA" includes the Occupational Safety and Health Review Commission.

EXHIBIT A

SURVEY OF PROCEDURES USED BY FEDERAL ADMINISTRATIVE AGENCIES FOR MITIGATION OF CIVIL PENALTIES

The Administrative Conference of the United States is evaluating the procedures used by federal administrative agencies to mitigate, remit or compromise civil money penalties. In 1972 the Conference recommended expanded use of formal administrative adjudication, subject to "substantial evidence" judicial review, as a method of assessing civil penalties (see Recommendation 72-6, attached). Nevertheless, a large number of agencies continue to utilize informal methods of assessing and compromising penalties, and even where a formal administrative adjudication is used, informal procedures may still be utilized for the purpose of mitigating, remitting or compromising the penalty. The focus of the current study is on the procedures—typically informal—used by agencies in reducing penalties once they have been assesed, by whatever method.

For purposes of this questionnaire, the term "civil penalty" includes all civil money penalties (whether called "penalties," "fines" or "forfeitures" by your agency). It does not include forfeitures of real or personal property, penalties or liquidated damages for breach of a Government contract, or sums withheld or recovered for failure to comply with the terms of a Government grant.

The terms "assess" or "assessment" refer to the process of determining whether and in what amount to assess a civil penalty. The process involves the determination of two kinds of issues: 1) whether a violation of law has occurred, and (if so) 2) what level of penalty is an appropriate sanction for such a violation (in those cases in which the agency is given discretion to set the amount of penalty initially assessed). The terms "mitigate" or "mitigation," by contrast, refer to the proces of determining whether and by what amount to reduce (or to "remit" or "compromise") a penalty, once assessed. Ordinarily, the only matter at issue at the mitigation stage is what level of penalty is an appropriate sanction for the violation.

The line between the "assessment" process and the "mitigation" process may not always be clearly drawn. Attempts by an alleged violator to seek mitigation of a penalty may occur concurrently with action by an agency to assess the penalty. The attached questionnaire is intended to elicit data regarding all mitigation procedures, however intermingled they may be with penalty assessment procedures.

QUESTIONS

Directions

Please ensure that your answers to the following questions cover your entire Department or Agency. If, however, your Department or Agency has more than one enforcement entity (bureau, division, administration, etc.) you may wish to return a *set* of responses rather than one collated response. This is fine as long as the name of each responding entity is adequately given on each response.

1. Name of Agency (or Department).

2. What civil penalty provisions does your agency have authority to enforce? Please indicate, for each statutory provision providing such authority:

a. statutory citation;
b. type(s) of conduct for which penalty may be assessed;
c. other sanctions which may be imposed for such violation;
d. amount of penalty (statutory fixed amount, maximum, range, or formula);
e. method of assessment (please indicate whether (i) by formal agency adjudication; (ii) by another method of agency determination; or (iii) by a court upon application of the agency or U.S. Attorney.*)

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* With respect to any type of civil penalty that can be assessed only by direct application to a court, please *omit* questions 3-14. Please indicate whether the agency has authority to initiate (Continued)

f. frequency of use (please indicate whether the penalty is assessed under such statutory provision (i) less than five times per year; (ii) from five to 20 times per year; or (iii) more than 20 times per year).

3. Does your agency have express statutory authority to mitigate any or all of the civil penalties which it has authority to enforce?

a. If so, please give statutory citation(s).

b. If not, do you believe that your agency has legal authority to mitigate penalties, nonetheless?

(i) If so, please indicate the source of such authority?

(ii) If you believe that you lack such authority, what is the basis for that belief?

4. Does your agency provide a procedure for mitigating civil penalties which is distinct from the procedure for assessing penalties? If so, please answer both questions 5 and 6. If not, please describe your agency's combined assessment/mitigation process in question 5 and omit question 6.

5. Please describe the procedure used by your agency for assessing civil penalties. In your description, please address at least the following aspects of the process:

a. How is the process initiated?

b. How is the alleged violation investigated, and by what unit and level of of agency staff?

c. What opportunity is afforded the alleged violator to present evidence or arguments to the agency, and at what stage?

d. Who in the agency has authority initially to assess a penalty?

e. Does your agency give the alleged violator a written statement of reasons for the assessment determination?

f. Are written reasons or summaries of assessment decisions prepared and retained by your agency? Are they used as precedents for subsequent decisions? Are they available to the public?

g. What form of administrative appeal from an initial assessment decision is provided to an alleged violator, and to whom?

6. Please describe the procedure used by your agency for the mitigation of civil penalties. In your description, please address at least the following aspects of the process:

a. How is the process initiated?

b. What form of agency investigation is conducted, if any, and by what unit and level of agency staff?

c. What opportunity is afforded the alleged violator to present information or arguments to the agency, and at what stage?

d. Who in the agency has authority to mitigate a penalty?

e. Does your agency give the alleged violator a written statement of reasons for its mitigation decision?

f. Are written reasons or summaries of mitigation decisions prepared and retained by your agency? Are they used as precedents for subsequent decisions? Are they available to the public?

g. What form of administrative appeal from a mitigation decision is provided to an alleged violator, and to whom?

(Continued)
such an application through its own attorneys or whether the case must be referred to a U.S. Attorney. In addition, please give for each of the most recent 5 years (specifying whether calendar or fiscal):

(i) the total number of cases in which such application was made;

(ii) the total dollar amount of civil money penalties sought in those cases;

(iii) the percentage of such cases settled before court decision.

7. To the extent your agency has discretion in setting the amount of the penalty to be assessed, what are your criteria? What are the criteria used by your agency for determining whether, and by what amount, to mitigate a civil penalty? If the mitigation criteria differ from the assessment criteria, please explain why.

8. To what extent are the assessment and mitigation procedures (questions 5 and 6) and criteria (question 7) used by your agency:

a. specified in the statute;
b. published (please provide citation);
c. written and publicly available; or
d. written, but not publicly available?

9. Does your agency have the authority to represent itself through its own counsel in collection suits filed in district court? If so, do you normally do so? Please elaborate if necessary.

10. Is a decision by your agency not to mitigate a civil penalty, or to mitigate by an amount less than that sought by the alleged violator, subject to judicial review? By what method? What is the scope of review of agency findings and conclusions? Please cite any relevant cases.

11. Does your agency regularly compile statistics on the volume (caseload and/or dollar volume) of its civil penalty assessment, mitigation or collection activities?

a. If so, please attach a copy of reports for the most recent five years.
b. If not, or to the extent that such reports do not contain the following information, please give, for each of the past five years:
    (i) the total dollar amount of penalties finally assessed by your agency;
    (ii) the total number of such cases;
    (iii) the total number of such cases in which a request for mitigation was received.

[For purposes of this and the following questions, "year" may mean calendar or fiscal year (please specify which). "Amount finally assessed" means the sum of amounts (1) accepted by the agency in final settlement of claims resolved without the necessity of initiating a collection action, *and* (2) referred for collection action (whether or not that amount was finally collected).]

12. Please provide the following information about *each* mitigation request processed to completion (collection or referral for collection action) within the last five years, or the most recent 50 such cases, whichever is fewer:

a. the statutory authority under which the penalty was assessed;
b. the amount of penalty initially assessed;
c. the amount of penalty finally assessed;
d. the amount of the penalty finally collected; and
e. how the penalty was finally collected; whether;
    (i) accepted by agency in final settlement before the collection action;
    (ii) accepted in final settlement after the initiation of the collection action;
    (iii) paid after final judgment by a court.

13. Does your agency have a quality control system whereby civil penalty assessment and/or mitigation decisions are checked for accuracy, consistency and conformity to agency policy? If so, please describe. If possible, please provide an example of how the system has been used to improve your agency's civil penalty administration.

14. Is your agency authorized to expend, without further appropriation, monies collected as a result of penalty assessments? If so, please cite statutory authority. What effect do you believe such authority has or would have on your agency's enforcement effort?

15. Please give the name and telephone number of the person to contact with any follow-up questions.

The Conference would appreciate your attaching a copy of any written description of the civil penalty assessment and/or mitigation process used by your agency.

Thank you for your cooperation.

REPORT IN SUPPORT OF RECOMMENDATION 79-4

(As published in: Ecology Law Quarterly, Vol. 8, 1980)

Cost-Benefit Analysis: An Inadequate Basis for Health, Safety, and Environmental Regulatory Decisionmaking*

*Michael S. Baram***

INTRODUCTION

The use of cost-benefit analysis in agency decisionmaking has been hailed as the cure for numerous dissatisfactions with governmental regulation. Using this form of economic analysis arguably promotes rational decisionmaking and prevents health, safety, and environmental regulations from having inflationary and other adverse economic impacts. Closer analysis, however, reveals that the cost-benefit approach to regulatory decisionmaking suffers from major methodological limitations and institutional abuses. In practice, regulatory uses of cost-benefit analysis stifle and obstruct the achievement of legislated health, safety, and environmental goals.

This Article critically reviews the methodological limitations of cost-benefit analysis, current agency uses of cost-benefit analysis under statutory requirements, the impact of recent Executive orders mandating economic balancing analyses for all major regulatory agency decisions, and agency efforts to structure their discretion in the use of cost-benefit analysis. The Article concludes that if the health, safety, and environmental regulators continue to use cost-benefit analysis, proce-

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* This study was originally prepared for the Administrative Conference of the United States (ACUS). The author has benefited from the insights and assistance of Messrs. David Martin and David Pritzker of ACUS, Chairman James Wesner and members of the ACUS Committee on Decisional Processes, particularly Professor Walter Gellhorn. The study is based in part on research, information, and findings developed under two other research projects supported by the National Science Foundation's Program on Ethics and Values in Science and Technology, and Brookhaven National Laboratory's Office of Environmental Policy. The author also wishes to thank the following people for their assistance: Raymond Miyares and Sheila Jasanoff of Bracken, Selig & Baram; and Barbara Shimmei, George Collins, Matthew Epstein, Ronald Shipley, and Robert Parodi, students at the Franklin Pierce Law Center. Finally, the author wishes to thank Ronald G. Aronovsky, Associate Editor, Ecology Law Quarterly, for his editorial assistance.

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dural reforms are needed to promote greater accountability and public participation in the decisionmaking process. Further, to the extent that economic factors are permissible considerations under enabling statutes, agencies should conduct cost-effectiveness analysis, which aids in determining the least costly means to designated goals, rather than cost-benefit analysis, which improperly determines regulatory ends as well as means.

I

COST-BENEFIT ANALYSIS AS A MEANS TO STRUCTURE AGENCY DISCRETION

A. Delegation of Authority to Achieve Multiple Objectives

In response to increasing concerns about risks to health, safety, and environmental quality, Congress has enacted several statutes[1] providing new schemes for agency decisionmaking. These statutes specify the problems to be addressed and the procedures to be followed, but provide little guidance on the analytical processes the federal agency should use in reaching regulatory decisions.

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[1] Health, safety, and environmental provisions requiring regulatory and public works agencies to weigh multiple considerations before taking action include the following: Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. § 136(bb) (West Supp. 1979) (determination that a pesticide has "unreasonable adverse effects" takes into account the economic, social, and environmental costs and benefits of its use); Consumer Product Safety Act, 15 U.S.C. § 2058(c) (1976) (promulgation of safety rules requires consideration of the risks of injury, number of products subject to the rule, public need for the product, probable effect of the rule on utility, cost, and availability of the product, and means of minimizing adverse effects on competition and manufacturing); *id.* § 2076(m)(4)(A)(i) (West Supp. 1979) (product safety standards must take into account the cost impact on and benefit to consumers and affected businesses); Toxic Substances Control Act, 15 U.S.C. § 2601(c) (1976) (Environmental Protection Agency (EPA) Administrator required to consider environmental, economic, and social impact of actions); National Forest Management Act of 1976, 16 U.S.C. §§ 1604(1) and 1606(d) (1976) (process must be devised to assess costs and benefits of reforestation, timber stand improvement, and sale of timber); Soil and Water Resources Conservation Act of 1977, 16 U.S.C. § 2005(a)(7) (Supp. I 1979) (development of conservation program shall analyze costs and benefits of alternatives); Clean Water Act § 303(c)(2), 33 U.S.C. § 1313(c)(2) (1976) (establishment of state water quality standards requires consideration of public health and safety, the waters' value for public supply, fish and wildlife propagation, and recreational, agricultural, industrial, and navigational uses); *id.* § 304(b)(1), 33 U.S.C. § 1314(b)(1) (determination of best practicable pollution control measures must consider cost of technology, age of equipment and facilities, engineering aspects, and nonwater quality environmental impact); *id.* § 315(a), 33 U.S.C. § 1325(a) (National Study Commission to evaluate social, economic, and environmental effects of achieving or not achieving effluent limitations); Water Resources Planning Act and Water Resources Development Act of 1974, 42 U.S.C. §§ 1962-2, 1962d-5e, 1962d-17 (1976) (congressional intent of assessing regional and national economic development and environmental protection in evaluating costs and benefits of water resource projects; establishment of wetlands authorized if environmental, economic, and social benefits justify increased costs; discount rate set for regional or river basin plans); National Environmental Policy Act of 1969, § 102(2)(B), 42 U.S.C. § 4332(2)(B) (1976) (all federal agencies required to give appropriate consideration to environmental values along with economic and technical factors); Solar Energy Research, Development, and Demonstration Act of 1974, 42 U.S.C. § 5556(b) (1976) (cost-benefit analysis required to demonstrate successful solar energy development program); Energy Reorganization Act of 1974, 42 U.S.C. § 5877(c) (1976) (Nuclear Regulatory Commission (NRC) must state goals and priorities related to costs, benefits, and risks of commercial nuclear power); Energy Conservation Standards for New Buildings Act of 1976,

The statutes typically prescribe a variety of general policy objectives, decisional criteria, and legislative findings to guide the agency in dealing with the substantive aspects of its decisionmaking. These factors usually fall into two competing categories: (1) the reduction of certain risks to health, safety, or environmental quality; and (2) the minimization of adverse economic effects on regulated entities, their employees, and consumers. In addition, an agency may be required to consider using the best practicable or available technology to reduce risks, promote energy conservation or national security, protect the small business sector, or encourage innovation.

Agencies must also consider the additional, and often inconsistent, objectives and requirements imposed by other statutes.[2] Operating with limited resources and conflicting objectives, federal agencies must therefore "make policy when Congress could make none" and afford "a fair degree of predictability of decision in the great majority of cases and of intelligibility in all."[3]

The statutes are usually silent as to the analytical method by which

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42 U.S.C. § 6839 (Supp. I 1977) (energy conservation performance standards must take into account efficiency, economic cost and benefit, and impacts upon affected groups); Clean Air Act, § 109(d)(2)(C), 42 U.S.C. § 7409(d)(2)(C) (Supp. I 1977) (scientific review committee to advise EPA Administrator of adverse public health, welfare, social, economic, and energy effects of attainment strategies for ambient air quality standards); *id.* § 111(a)(1)(C), 42 U.S.C. § 7411(a)(1)(C) (existing source performance standards to be established with reference to best technological system, with consideration of cost, nonair quality health and environmental impacts, and energy requirements); *id.* § 164(b)(1)(A), 42 U.S.C. § 7474(b)(1)(A) (description and analysis of health, environmental, economic, social, and energy effects required prior to air quality area redesignation); *id.* § 202(a)(3)(A) (i), (iii), 42 U.S.C. § 7521(a)(3)(A)(i), (iii) (motor vehicle emission standards to be established by considering cost, noise, energy, and safety effects of emission reduction); *id.* § 211(c)(2)(B), 42 U.S.C.A. § 7545(c)(2)(B) (West Supp. 1979) (cost-benefit analysis required for emission control devices before control or prohibition of certain fuels or fuel additives).

[2] *See* NATIONAL ACADEMY OF SCIENCES, DECISION MAKING FOR REGULATING CHEMICALS IN THE ENVIRONMENT 17-22 (1975) [hereinafter cited as CHEMICALS REPORT].

[3] Friendly, *The Federal Administrative Agencies: The Need for a Better Definition of Standards*, 75 HARV. L. REV. 873, 874 (1962). Although structuring discretion to accommodate multiple considerations in decisionmaking has not received sufficient congressional attention, there are recent indications of congressional concern over excessive delegation. *See* SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., 5 STUDY ON FEDERAL REGULATION (Comm. Print 1977), which recommends, in part: "The mandates of the independent regulatory agencies should be drafted by Congress in as narrow and specific a manner as possible. Where broad delegations of authority are determined by Congress to be unavoidable, congressional oversight of subsequent agency action should be significantly increased." *Id.* at XIII. *See also* letter from Senator Edmund Muskie to Comptroller General Elmer Staats (Aug. 5, 1977), *reprinted in* GENERAL ACCOUNTING OFFICE, IMPROVED FORMULATION AND PRESENTATION OF WATER RESOURCES PROJECT ALTERNATIVES PROVIDE A BASIS FOR BETTER MANAGEMENT DECISIONS 18 (Feb. 1, 1978) [hereinafter cited as

the agency must balance these diverse factors. At most, Congress occasionally specifies that certain factors are subordinate to others.[4] As a result, Congress delegates considerable discretion to the agency to structure the central feature of its decisionmaking—the balancing of multiple objectives necessary to reach a decision.[5]

Judicial review of agency action ensures compliance with express or implied statutory balancing requirements. According to the District of Columbia Circuit, for example, the National Environmental Policy Act of 1969 (NEPA)[6] requires agencies to use a "case by case balancing judgment" in which "the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs."[7] This court also construed the Safe Drinking Water Act,[8] a statute generally assumed to promote the single objective of public health, to require a balancing of multiple considerations.[9]

Muskie letter to GAO] (requesting a report describing how the Corps of Engineers and other water resource agencies limit their discretion in decisionmaking).

Economists, engineers, and other analysts of public sector decisionmaking are addressing the multiple objective problem. *See* R. KEENEY & H. RAIFFA, DECISIONS WITH MULTIPLE OBJECTIVES: PREFERENCES AND VALUE TRADE-OFFS (1976); E. STOKEY & R. ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS (1978) [hereinafter cited as STOKEY & ZECKHAUSER].

[4] *See, e.g.*, Clean Air Act § 317(e), 42 U.S.C. § 7617(e) (1976) (consideration of economic effects does not lessen the Administrator's duty to protect public health and welfare).

[5] Judge Bazelon has observed:

> Traditionally, in democratic societies, it is elected legislatures that make the hard value choices. Indeed, this is precisely what legislatures are designed to do. Increasingly, however, our legislatures have been delegating these value choices to administrative agencies—institutions which cannot resolve value conflicts through the relatively simple expedient of a show of hands.

D. Bazelon, Coping with Technology Through the Legal Process 12 (Jan. 10, 1977) (paper presented at Atomic Industrial Forum, Inc., Conference on United States Energy Policy, Washington, D.C.). *See also* Battelle Pacific Northwest Labs, Review of Decision Methodologies for Evaluating Regulatory Actions Affecting Public Health and Safety (Dec. 1976) [hereinafter cited as Battelle Report]. The report states:

> The most significant feature of the legal setting for health and safety regulations is that both Congress and the courts give the agencies broad discretion in making decisions. With few exceptions . . . , Congress has simply told the agencies to protect public health and safety and has not indicated guidelines for acceptable incremental safety expenditures or ways to determine an acceptable approach.

Id. at ix. *See also* CHEMICALS REPORT, *supra* note 2, at 11-22.

[6] 42 U.S.C.A. §§ 4321-4368 (West Supp. 1979).

[7] Calvert Cliffs' Coordinating Comm'n v. AEC, 449 F.2d 1109, 1123 (D.C. Cir. 1971).

[8] 42 U.S.C.A. §§ 300f-300j-10 (West Supp. 1974-1978).

[9] Environmental Defense Fund v. Costle, 578 F.2d 337 (D.C. Cir. 1978). The court observed:

> The task of the agency here is largely one of line drawing. Agency expertise and judgment must be applied in determining the optimal balance between promotion of the public welfare and avoidance of unnecessary expense. [The court] will not interfere so long as the agency strikes a balance that reasonable [*sic*] promotes the legislative purpose.

Id. at 346.

Similarly, the Fifth Circuit construed the Occupational Safety and Health Act, 29

There is, however, no consensus as to how courts should review agency balancing. Judge Leventhal believed that the judiciary should play a central role in "ensuring the principled integration and balanced assessment of environmental and nonenvironmental considerations in federal agency decisionmaking."[10]

> [T]o the extent that special knowledge [is] involved, it [is] the knowledge of how matters are proven, and that is a field in which courts have always had a special interest and in which they cannot escape keeping up with the scientific times. . . . There may be recondite problems on the frontier of statistical and probability theory that a court cannot meaningfully handle. Basically, however, a court can, by diligence and attentiveness, address itself to issues of how matters are proven, even though understanding such issues may involve some inkling of statistical significance.[11]

In contrast to Judge Leventhal's urging that courts evaluate the substantive and analytical aspects of agency decisionmaking, Judge Bazelon concludes that courts should defer to the scientific and technological determinations and value preferences of the agencies. Instead, "the important thing is that the agency generate a record in which the factual issues are fully developed" in order to "make possible effective professional peer review, as well as legislative and public oversight."[12]

As a result of these statutory and judicial attitudes about balancing, regulatory agencies have sought to develop new techniques for structuring their discretion. Most of these techniques are variations on the theme of cost-benefit analysis.

B. Use of Cost-Benefit Analysis

1. Defining Cost-Benefit Analysis

Cost-benefit analysis derives from simple profit and loss accounting traditionally practiced by business organizations.[13] Cost-benefit analysis

> involves translating the attribute performances of alternatives into dollar quantities. The favorable attribute performances are added to-

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U.S.C. § 652(8) (1976), to require that the Occupational Safety and Health Administration (OSHA) justify its workplace health standard for benzene by demonstrating a reasonable relationship between the quantified costs and benefits of the proposed regulation. American Petroleum Institute v. OSHA, 581 F.2d 493, 503-05 (5th Cir. 1978), *cert. granted sub. nom.* Marshall v. American Petroleum Institute, 440 U.S. 906 (1979).

[10] Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509, 555 (1974).

[11] *Id.* at 533.

[12] D. Bazelon, *supra* note 5, at 8. But see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), in which the Supreme Court limited the authority of federal courts to require procedures beyond those provided by the Administrative Procedure Act, 5 U.S.C. §§ 500-700 (1976). See note 22 *infra*.

[13] *See* E.J. Mishan, Cost Benefit Analysis 6 (1973).

> gether to become the benefits. The sum of the unfavorable attribute performances is the cost. Thus, the cost-benefit analysis can be viewed as a process of deriving dollar values for each entry in a performance matrix and aggregating all of the performances into one attribute, either net benefits (benefit minus cost) or a benefit to cost ratio.[14]

A decision is justifiable when net benefit is positive or a benefit-to-cost ratio is greater than one.

Policy analysts have broadened the meaning of cost-benefit analysis to encompass virtually any analytical method that organizes information on alternative courses of action or displays possible trade-off opportunities, thereby structuring decisionmaking.[15] Thus, the cost-benefit rubric encompasses many different types of analyses. Some of these analyses simply adopt a previously determined objective, leaving only the "cost" side of the balance sheet to be developed. For example, in establishing an emission standard for the discharge of ionizing radiation from a nuclear reactor, an analyst may be "given" a preexisting standard for the ambient level of radiation necessary to protect human health near the reactor. This standard represents a conclusive determination of the degree of societal benefit to be achieved and reduces the analyst's task to finding the most cost-effective method to meet the ambient standard. Hence, the analysis in this truncated format is a simpler task of cost-effectiveness analysis. *Cost-benefit analysis*, then, is used by the decisionmaker to establish societal goals as well as the means for achieving these goals, whereas *cost-effectiveness analysis* only compares alternative means for achieving "given" goals.[16] This Article focuses on cost-benefit analysis.

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[14] Battelle Report, *supra* note 5, at 53. *See also* STOKEY & ZECKHAUSER, *supra* note 3, at 136-37.

[15] *See* CHEMICALS REPORT, *supra* note 2, at 39:

> Benefit-cost analysis . . . is not a rule or formula which would make the decision or predetermine the choice for the decision maker. Rather, it refers to the systematic analysis and evaluation of alternative courses of action drawing upon the analytical tools and insights provided by economics and decision theory. It is a framework and a set of procedures to help organize the available information, display trade-offs, and point out uncertainties. . . .

Cost-benefit analysis is thought to simplify decisions "by reducing the relevant factors to numbers that can be added, subtracted and compared. The only unit generally considered feasible for doing this is the dollar, but the use of dollar values poses a great many problems." *Id.* at 41. *See also* Battelle Report, *supra* note 5; W. ROWE, AN ANATOMY OF RISK (1975); and E.J. MISHAN, *supra* note 13. For a lucid review of 16 techniques for analyzing and improving systems frequently used in the data and organization stages of cost-benefit analysis, see A.L. McCauley, Statistics-Based Systems Techniques: Concepts, Examples, Applications (Feb. 16, 1972) (IBM Data Processing Technical Publication).

[16] See discussion of this distinction in Baram, *Legal and Institutional Aspects of Using Benefit-Cost Analysis to Control Ionizing Radiation*, in CONSIDERATIONS OF HEALTH BENEFIT-COST ANALYSIS FOR ACTIVITIES INVOLVING IONIZING RADIATION EXPOSURE AND ALTERNATIVES 107-12 (1977) (EPA Rep. No. 520/4-77-003) [hereinafter cited as RADIATION REPORT]. *See also* Weinberg, *Benefit-Cost Analysis and the Linear Hypothesis*, 271 NATURE 596 (1978).

2. *Adoption of Cost-Benefit Analysis by Federal Agencies*

The continuing efforts of regulatory agencies to balance competing considerations,[17] such as public health and economic feasibility, are beset by a number of special problems. The technical problems include an ever-expanding, but limited and generally inconclusive data base,[18] disagreement among experts on methods for using data, lack of consensus as to findings and their applicability to problems at hand, and unquantifiable attributes. Regulators must also value low probability, high cost events while taking into consideration the diverse and changing values of our pluralistic society.[19] Moreover, an atmosphere of "crisis management" is promoted by statutory time limitations and pressures from various interests.

Mandated by statutes[20] and recent Executive orders[21] to conduct complex "balancing analyses" to reach decisions, regulatory agencies are under considerable pressure to adopt cost-benefit analysis.[22] The use of cost-benefit analysis in regulatory decision processes has been promoted by economic consultants and advisory committees to the agencies drawn from the scientific and engineering communities, including the National Academy of Sciences.[23] In addition, regulated industries have urged agencies to use cost-benefit analysis in considering the economic impacts of regulations. Their efforts include challenging agency actions not premised on cost-benefit analysis in lawsuits, lobbying for amendments to existing statutes to require agencies to engage in cost-benefit analysis, conducting studies demonstrating the inflationary and other adverse economic effects of agency decisionmaking not premised on cost-benefit analysis, and advertising campaigns against regulation conducted without cost-benefit analysis.[24] The public also has become increasingly critical of regulation as a cause of societal and economic ills.[25] In response to these demands for reform, Presidents Ford and Carter issued several Executive orders requiring agencies to conduct "inflationary impact analyses" and other regulatory analyses of a monetary or economic nature in their major rulemaking activities.[26]

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[17] Public works agencies have used cost-benefit analysis since the late 19th century. M. Baram, Federal Energy Regulation and the Use of Cost-Benefit Analysis: Legal and Public Policy Considerations 1-8 (Oct. 1, 1977) (Report to Environmental Policy Office, Brookhaven National Laboratory) [hereinafter cited as Brookhaven Report]; J. Tarr & F. McMichael, *The Evolution of Wastewater Technology and the Development of State Regulation: A Retrospective Analysis* in RETROSPECTIVE TECHNOLOGY ASSESSMENT—1976, at 165 (J. Tarr ed. 1977). Congress specifically approved the technique in water resource development projects in 1936 (Flood Control Act of 1936, 33 U.S.C.A. §§ 701-709(a) (West Supp. 1979)), and most federal public works agencies adopted cost-benefit analysis soon afterward. This early use of cost-benefit analysis by public works agencies was deficient in several respects. For example, the agencies failed to consider environmental costs and applied inadequately low interest rates to discount future benefits and costs to present values. *See* Roberts, *Benefit-Cost Analysis: Its Use (Misuse) in Evaluating Water Resource Projects*, 14 AM. BUS. L.J. 73, 81-83 (1976); R. Mikesell, The Rate of Discount for Evaluating Public Projects (1977) (American Enterprise Institute for Public Policy Research); and U. Kim, A Benefit-Cost Approach to Water Resource Investments: Theory and Its Application (Sept. 1977) (unpublished paper, Dep't of Economics and Business Management, Cath. U., Washington, D.C.). The enactment of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. §§ 4321-4368 (West Supp. 1979), and an increased discount rate have partially alleviated this problem. *See* Roberts, *supra*. *See also* U.S. Comptroller General, Survey of Use by Federal Agencies of the Discounting Technique in Evaluating Future Programs (Jan. 28, 1968) (Report to the Joint Economic Committee).

[18] *See, e.g.*, Chalfant, Hartmann & Blakeboro, *Recombinant DNA: A Case Study in Regulation of Scientific Research*, 8 ECOLOGY L.Q. 55 (1979) [hereinafter cited as *Recombinant DNA*]. For background on decisionmaking from an uncertain data base, see W. LOWRENCE, OF ACCEPTABLE RISK (1976), Battelle Report, *supra* note 5, and CHEMICALS REPORT, *supra* note 2.

[19] For a more detailed description of problems associated with societal values, such as public preference for voluntary over involuntary risks, see *Recombinant DNA*, *supra* note 18, at 59-60, 81-83.

[20] See note 1 *supra*.

[21] Exec. Order No. 11,821, 3 C.F.R. 926 (1971-1975 Compilation), *amended by* Exec. Order No. 11,949, 42 Fed. Reg. 1017 (1976); Exec. Order No. 12,044, 3 C.F.R. 152 (1978 Compilation).

[22] However, the courts have given the regulatory agencies a relatively free hand to establish procedures for conducting cost-benefit analysis. *See* Vermont Yankee Nuclear

The increasing pressure upon agencies to use cost-benefit analysis raises a variety of methodological, legal, and public policy issues: quantification of hitherto unquantifiable factors, such as aesthetics, ecological change, and human mortality; the proper degree of congressional, judicial, and public deference to agency decisions; the choice of

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Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). In that case, the NRDC challenged an AEC rulemaking procedure dealing with spent fuel from a reactor and the use of the rule in cost-benefit analysis for licensing Vermont Yankee's light water reactor. The District of Columbia Court of Appeals overturned the rulemaking because of the AEC's failure to employ certain procedural devices beyond the statutory minima. The Supreme Court held that the circuit court had improperly intruded into the AEC's rulemaking authority and remanded the case.

[23] *See, e.g.*, CHEMICALS REPORT, *supra* note 2; L. LAVE & E. SESKIN, AIR POLLUTION AND HUMAN HEALTH, 209-51 (1977); NATIONAL ACADEMY OF SCIENCES, DECISIONMAKING IN THE ENVIRONMENTAL PROTECTION AGENCY (1977); RADIATION REPORT, *supra* note 16; Kletz, *What Risks Should We Run?*, 74 NEW SCIENTIST 320 (1977); Oi, *Safety at Any Price*, REGULATION 16 (Nov./Dec. 1977); Comments of Paul W. MacAvoy, Government Regulation: Where Do We Go From Here? (Dec. 19, 1977) (Round table discussion sponsored by American Enterprise Institute for Public Policy Research).

[24] *See, e.g.*, Mobil Oil's five-part series on "The Capitalist Revolution" culminating in "A Proposal for Change," which calls for "[a] requirement that clear and unbiased Economic Impact Statements—spelling out their effects on jobs, costs, inflation and the national economy—accompany all new major regulations and legislation." N.Y. Times, July 27, 1978, § A, at 19.

[25] A public survey by the National Science Foundation indicates that the public overwhelmingly believes governmental decisionmakers are most at fault when science and technology cause problems. Sixty percent of those surveyed attributed such problems to governmental decisionmakers, only 14% to business decisionmakers, and 12% to the scientific and engineering communities. National Science Board, National Science Foundation, Science Indicators 1976 (1977).

[26] See note 21 *supra*.

discount rates for dealing with future social costs and benefits; constitutional requirements for separation of powers, due process, and equal protection; and potential conflicts between highly specific Executive orders and general statutory requirements. The following sections address the major methodological problems and limitations inherent in cost-benefit analysis, several agencies' experience with cost-benefit analysis, and suggestions for dealing with specific problems.

II

METHODOLOGICAL ISSUES IN REGULATORY USES OF COST-BENEFIT ANALYSIS

Many studies have identified the methodological limitations in the use of cost-benefit analysis as a basis for governmental decisionmaking.[27] Nevertheless, regulatory agencies continue to use cost-benefit analysis on many questions that present significant difficulties. The problems discussed in this section are not uniquely attributable to the analytical restraints of cost-benefit analysis, but stem from estimates based on scanty technical facts and the consideration of diverse values. Furthermore, many of the cost-benefit analysis problems are fundamental problems of the regulatory process itself, including good faith objectivity, effective citizen participation, and agency accountability. Other problems arise from unresolved constitutional problems, including the congressional delegation of broad and unguided authority to agencies and presidential intervention to promote consideration of economic factors conflicting with statutory requirements that stress health, safety, or environmental considerations. The following discussion briefly inventories methodological issues[28] raised by the use of cost-benefit analysis in regulatory agency decisionmaking.[29]

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[27] The literature on cost-benefit analysis is curious in that a typical article will candidly treat the limitations of cost-benefit analysis and warn against overreliance upon its use, but thereafter describe its possible use in a particular situation and finally urge adoption of the results. See, for example, the cautionary beginnings, ambiguous discussion, earnest application, and upbeat conclusions on cost-benefit analysis in the National Academy of Sciences reports cited in notes 2 & 23 *supra*.

In addition to the works cited in notes 5, 13, & 23, *supra*, useful background information is provided by reviewing the following congressional committee studies and reports: JOINT ECONOMIC COMM., 94TH CONG., 2D SESS., FAST BREEDER REACTOR DECISION: AN ANALYSIS OF LIMITS AND THE LIMITS OF ANALYSIS (Comm. Print 1976); SUBCOMM. ON ENERGY AND ENVIRONMENT OF THE HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 94TH CONG., 2d. SESS., PROCEEDINGS OF A CONGRESSIONAL SEMINAR ON LOW-LEVEL IONIZING RADIATION (Comm. Print 1976); SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2D SESS., FEDERAL REGULATION AND REGULATORY REFORM (Comm. Print 1976).

[28] This Article does not address the theoretical problems underlying cost-benefit analysis. For instance, not every economically efficient policy, one whose benefits exceed its costs, will increase overall social welfare if economic inefficiencies exist in other sectors of the economy. *See* Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11-32 (1956-57).

A. Inadequate Identification of Costs and Benefits of Proposed Action

One of the first steps in cost-benefit analysis is identifying the implications of regulatory options. Forecasting techniques notoriously fail to identify the possible primary, secondary, and tertiary consequences of a proposed action—particularly if that action sets a standard with diffuse health or environmental consequences that extend geographically and temporally. For example, analysts have great difficulty estimating the specific social and economic costs and benefits of regulatory options for controlling carcinogens.[30] Cost-benefit analysis "offers no protection against historically bad assumptions. . . . [F]oolproof techniques for forecasting unforeseen consequences are by definition nonexistent."[31]

The problem of inadequate or impossible measurement of attributes is related to the deficiencies of forecasting techniques. For instance, the "skimpy science" of toxicity is an acknowledged problem for regulatory officials seeking to measure costs and benefits of possible regulatory options for the control of toxic substances.[32] Without the knowledge, techniques, trained personnel, and funds to measure these factors adequately, gross error in estimation may result. Similarly, many environmental effects, such as changes in ecosystems, cannot be estimated with confidence because no acceptable method exists to measure these attributes.[33]

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[29] For further information on the methodological problems of cost-benefit analysis, see publications cited in notes 2, 5, 13, & 23 *supra*. The author has written extensively on many of these problems. *See* Brookhaven Report, *supra* note 17, at 1-8; RADIATION REPORT, *supra* note 16; Baram, *An Assessment of the Use of Cost-Benefit Analysis in Regulatory Agency Decision Making*, in RETROSPECTIVE TECHNOLOGY ASSESSMENT—1976, at 15 (J. Tarr ed. 1977); Baram, *Radiation from Nuclear Power Plants: The Need for Congressional Directives*, 14 HARV. J. LEGIS. 905 (1977); Baram, *Regulation of Environmental Carcinogens: Why Cost-Benefit Analysis May Be Harmful to Your Health*, 78 TECH. REV. 41 (1976); *Symposium: Risk-Benefit Assessment in Governmental Decision Making*, 45 GEO. WASH. L. REV. 901 (1977).

[30] *See* D. Rice & T. Hodgson, Social and Economic Implications of Cancer in the United States (June 1978) (report presented by statisticians and economists at the National Center for Health Statistics, U.S. Dep't of Health Education and Welfare to Expert Committee on Cancer Statistics of the World Health Organization and the International Agency for Research on Cancer at Madrid, Spain) [hereinafter cited as Rice and Hodgson]. This paper raises numerous questions about the application of cost-benefit analysis to the regulation of carcinogens, including whether the economic benefits of regulating a carcinogen include reducing the need for extra household help and special diets for patients, transportation costs for receiving medical treatment, and losses to patients that otherwise would occur in the form of reduced capital gains arising from their forced sale of assets. The report also questions whether analysis should include anxieties, personality changes, reduced sexual functions, and other social costs. Indeed, the lengthy report raises so many types of costs and benefits that it is doubtful whether any agency would have the resources to undertake the analysis.

[31] STOKEY & ZECKHAUSER, *supra* note 3, at 148-49.

[32] Interview with Steven Jellineck, Assistant Administrator for Toxic Substances, U.S. Environmental Protection Agency, in Washington, D.C. (Mar. 17, 1978).

Furthermore, characterization of attributes may be problematic. An attribute deemed a benefit by an agency official may pose the problem of beneficiaries who do not desire the benefit or who do not even consider the attribute to be a benefit. For example, "cheap energy" is normally characterized as a benefit in a proceeding considering the construction of an energy facility. It may, however, be immaterial to those who have enough energy, or may be viewed as a cost to proponents of resource conservation.[34]

Even if costs and benefits are identified, they may not be included in subsequent analysis for pragmatic reasons. Attributes may be too costly or too complex to measure. Exclusion may be based on a tenuous causal connection between the planned action and the possible attribute, as with the predicted probabilities of secondary or tertiary effects of a proposed agency action. Identified attributes also may be excluded for self-serving reasons. For example, if consideration of a possible disastrous consequence of a regulatory decision would tilt the outcome of the analysis against a favored agency action, it might be omitted from the final balancing process.[35]

B. Quantifying the Value of Human Life and Other Traditionally Unquantifiable Attributes

Cost-benefit analysis works best when (1) a socially accepted method, such as market pricing, is available to measure the costs and benefits, and (2) the measurement can be expressed in dollars or some other commensurable unit. Regulatory agencies using cost-benefit analysis face a critical problem when confronted with attributes that defy traditional economic valuation.[36]

Analysts are well aware of these problems. Some refrain from placing their own values on immeasurable attributes and redirect their analyses.[37] More typically, analysts recommend cautious use of cost-benefit analysis.[38] Inconclusive analyses of valuation difficulties in cost-benefit literature reflect the hope that the problem will fade or be forgotten. For instance, although Stokey and Zeckhauser maintain that the complexity and importance of measuring intangible costs and benefits should not be underestimated, they ultimately conclude that perhaps quantification should be consciously postponed.

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[33] *See* SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2D SESS., FEDERAL REGULATIONS AND REGULATORY REFORM 515 (Comm. Print 1976), which concludes that inability to measure some attributes accurately militates against certain uses of cost-benefit analysis.

[34] See further discussion of the often ambiguous character of attributes included in cost-benefit analysis in Lovins, *Cost-Risk-Benefit Assessments in Energy Policy*, 45 GEO. WASH. L. REV. 911 (1977). Lovins entertainingly describes how different values lead to different characterizations of an attribute: "Is an artful new kind of synthetic desert a benefit or a disgrace?" *Id.* at 914.

[35] *See* Mark & Stuart-Alexander, *Disasters as a Necessary Part of Benefit-Cost Analyses*, 197 SCI. 1160 (1977).

[36] The implications of DNA experimentation present a striking example of intangible decisional critiera that raise critical cost-benefit valuation problems. *See generally Recombinant DNA*, *supra* note 18.

> In some cases, it may be best to avoid quantifying some intangibles as long as possible, carrying them along instead in the form of a written paragraph of description. Maybe we will find that the intangible considerations point toward the same decision as the more easily quantified attributes. Maybe one or a few of them can be adequately handled by a decision-maker without resort to quantification. We will find no escape from the numbers. . . . Ultimately the final decision will implicitly quantify a host of intangibles; there are no incommensurables when decisions are made in the real world.[39]

This use of cost-benefit analysis is morally and intellectually irresponsible.

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[37] In evaluating control options for sulfur dioxide air pollution from stationary sources, Dr. Granger Morgan asserts:

> There is no way that I can put a dollar value on this case. That would require me to place a dollar value on human life, and no reasonable person is prepared to do that. But I might reasonably ask how much money society is prepared to invest in order to statistically prevent one additional air pollution related death.

G. Morgan, Technical Uncertainty in the Policy-Making Process 18 (Oct. 25, 1977) (paper presented at Sixth Annual Conference of Illinois Institute for Environmental Quality).

[38] The National Academy of Sciences Committee on Principles of Decision-Making for Regulating Chemicals in the Environment notes: "Different individuals place different values on things such as human life, aesthetics, or national security. Thus an analysis that assigns a quantitative value to . . . these factors is necessarily subjective and, to some degree arbitrary." CHEMICALS REPORT, *supra* note 2, at 40. The Committee notes that even where the analyst refrains from placing a dollar value on human life, a particular decision reflects an implicit valuation of life. Nevertheless, the Committee concludes that compared to other methods, cost-benefit analysis represents a significant advance and recommends its own version, called "Hazard-Cost-Benefit Comparison." *Id.* at 39-50.

[39] STOKEY & ZECKHAUSER, *supra* note 3, at 153. Others have responded to the problem of valuation as an opportunity to exhibit their statistical finesse. For example, Walter Oi has undertaken to determine the price society is willing to pay for more safety.

> The situation becomes a bit more complicated when the accidents involve truly nontraded goods like lives and limbs. Even here, market prices can be used to infer some implicit valuations of the contingent accident costs. Using data on wage differentials, Thaler and Rosen found that workers behaved as if they attached a value to life of $160,000 to $260,000. Robert S. Smith, using a slightly different body of data, came up with considerably higher implicit values of up to $1.5 million for a life. Some variations ought to be expected because human lives are not homogenous goods like bags of No. 2 wheat.

Oi, *supra* note 23, at 19.

Oi concludes that "[s]afety and health are important economic issues," and that "[w]hether it is direct or indirect, stated or implicit, there is always a 'price' for reducing illness and accidents." *Id.* at 23. This intolerance of the experts for intangibles—for matters not expressed in dollars or other economic units of value—and this limited perspective on health, safety, and the environment pervades the cost-benefit analysis literature and has influenced agency users of cost-benefit analysis.

Today, a number of agencies assign monetary values to human life. The Nuclear Regulatory Commission (NRC) uses a value of $1,000 per whole-body rem in its cost-benefit analysis.[40] This figure, multiplied by the number of rems capable of producing different types of deaths, provides dollar values for human life. The Environmental Protection Agency's Office of Radiation Programs establishes its environmental radiation standards at levels that will not cost more than $500,000 for each life to be saved.[41] The Consumer Product Safety Commission uses values ranging from $200,000 to $2,000,000 per life in its analyses.[42]

But the fundamental issue is whether cost-benefit analysis is appropriate at all. Without an answer to this question from Congress or the courts, consideration turns to lesser issues: the proper method of valuation,[43] the substantive basis for valuation (possibly relying on insurance statistics, jury awards, or potential lifetime earnings), and the extent agencies should articulate these issues and provide procedures for participation in the valuation process.

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[40] 10 C.F.R. pt. 50 app. I (1979).

[41] Interview with Dr. William Rowe, Chief Radiation Program Office, EPA, in Washington, D.C. (1977). Dr. Rowe stated that EPA would not propose a radiation standard for the uranium fuel cycle that would cost more than $500,000 to save an additional, unspecified human life in the general population; it would save a life if the cost were less than $100,000. For costs in between, EPA makes an ad hoc determination.

[42] *See* B. Shimmei, Consumer Product Safety Commission: Risk Management Regulation and the Use of Cost-Benefit Analysis (May 1978) (unpublished draft for M. Baram project on Federal Regulation and Risk Management, based in part on extensive interviews with CPSC personnel). For an extensive Department of Transportation report setting values for human life, see NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, SOCIETAL COSTS OF MOTOR VEHICLE ACCIDENTS (Dec. 1976). This work and its periodic revisions are frequently consulted and cited with respect to monetary valuation of human life and health. The National Bureau of Standards, in its studies to find technical solutions to problems of flammable fabrics and other consumer hazards for regulatory agencies such as the Consumer Product Safety Commission (CPSC), has used a value of $300,000 per life in arriving at its recommendations. *See* U.S. NATIONAL BUREAU OF STANDARDS, PRELIMINARY REPORT ON EVALUATING ALTERNATIVES FOR REDUCING UPHOLSTERED FURNITURE FIRE LOSSES 13 (Nov. 1977) (NBSIR-77-1381).

[43] Consider the approach adopted by statisticians and economists at the Department of Health, Education and Welfare in their reports on the cancer data base available for use by regulatory agencies:

> One, if not the chief, issue with respect to indirect costs is how to value human life. The method in this report is referred to as the "human capital" approach because it views an employed person as producing a stream of output over the years that is valued at the individual's earnings. The main criticism of this methodology is that it excludes intangibles, only counting earnings, and under-values some groups relative to others because earnings may not reflect one's ability to produce. Thus, men are more highly valued than women, whites more than blacks, and the middle-aged more than the young and elderly. . . .
>
> An alternative approach favored by some is that of "willingness to pay." This method values human life according to the amount people are willing to spend to obtain reductions in the probability of death. Objections to this are that the value of individual lives depends on the income distribution, with the rich able to pay more than the poor, and that it is exceedingly difficult for persons to place a value on small reductions in the probability of death.

Rice & Hodgson, *supra* note 30, at 18-19.

To date, agencies have expressed surprisingly little concern about these unresolved problems associated with cost-benefit analysis.[44] Although officials deny valuing unquantifiable factors,[45] these valuations are implicit in any cost-benefit based policy decision involving risks to human life. Responsible decisionmaking demands that implicit valuations be acknowledged and addressed explicitly.

C. The Chronic Problem of the Discount Rate for Valuing Future Benefits and Costs in Present Analyses

The discount rate is yet another controversial issue afflicting cost-benefit analysis. Stokey and Zeckhauser note that "no observed rate of return can provide an accurate reading of the intertemporal preferences of the society as a whole. . . . [T]he choice of a discount rate should be used deliberately to apportion costs and benefits among income groups and . . . generations, according to the values held by society."[46] Congress and the courts, however, have not decided upon a standard discount rate to establish the present value for future dollar levels of predicted attributes, such as future ecological dislocation, mutagenic effects on future generations, and other long-term consequences of actions taken by regulatory agencies.

Absent a societal decision on the appropriate discount rate, the task of establishing a present value for the future effects of agency decisions falls upon the individual analyst. This has resulted in arbitrary, inconsistent determinations in many cost-benefit analysis decisions.[47]

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[44] For a rare exception and candid expression of concern, see W. Prunella, A Qualitative Assessment of Cost-Benefit Analysis and its Application in the Area of Product Safety 3-4 (undated draft received Feb. 1978 from Economic Program Analysis Division, Consumer Product Safety Commission):

> No accepted monetary figures for the value of life exist; nor should we expect them to exist. . . . [F]actors such as age or occupation will influence the money value placed on costs incurred. . . . [I]f children and the poor are victims, remedial action may not seem justified from the calculation of cost-benefit ratios, when at the same time, if the victims had been of a different age or income level, action would be more readily supportable.

[45] Steven Jellineck, Assistant Administrator for Toxic Substances, U.S. Environmental Protection Agency, declared at a meeting of the Administrator's Advisory Committee on Toxic Substances, Nov. 1977 that his division was not going to put a dollar value on life. In light of the statutory requirements of § 6(c) of the Toxics Substances Control Act, 15 U.S.C. § 2605(c) (Supp. I 1977), however, it appears that some form of cost-benefit analysis will be adopted to regulate toxic substances. See discussion of EPA in part III of this Article.

[46] STOKEY & ZECKHAUSER, *supra* note 3, at 173. *See* R. Campbell, Food Safety Regulation 19 (AEI-Hoover Study 12, Aug. 1974).

[47] Indeed, analysts have chosen rates that tend to confirm the outcomes they desire. Critics have attacked the use of self-serving and essentially arbitrary discount rates in the water resource projects of developer agencies such as the Corps of Engineers. The use of low discount rates, such as 2.63% in the 1950's and 1960's provided higher values for the

For instance, agency analysts have not agreed on a discount rate for the long-term carcinogenic and mutagenic effects of radioactive isotopes and toxic chemicals. Suggested rates for the future costs of cancer and other diseases range from six to ten percent, without any notable underlying rationale.[48] Analysts seem to be feeling their way toward some sign of societal acquiescence on a discount rate for long-term health and environmental attributes.[49]

But focusing on the search for the societally acceptable number for discounting the future clouds the larger issue: whether using these economic principles in contemporary decisionmaking adequately ensures the desirable quality of life and health for future generations.[50] Ultimately, the discount rate issue is an ethical problem that transcends economic and legal perspectives.[51]

D. Improper Distribution of Costs and Benefits

Every regulatory decision on health, safety, or environmental problems results in costs and benefits that will be distributed in some pattern across different population sectors, and in many cases, over several generations. For example, a decision to allow the commercial distribution of a toxic substance may result in economic benefits to the industrial users, their shareholders and employees, and consumers. It may also result, however, in adverse health effects and property damage to plant employees and those living near the plant. In addition, future generations may suffer mutagenic health effects or the depletion or pollution of natural resources.

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estimated future benefits of planned projects to Corps analysts, resulting in positive cost-benefit analysis ratios and favorable decisions on water resource projects. These low rates were below the yield on long-term governmental securities and Treasury issues. The debate over an appropriate discount rate for water resources projects continues today, as evidenced by President Carter's objections to proposed projects based upon a 6.38% discount rate. R. Mikesell, The Rate of Discount for Evaluating Public Projects 3-5 (AEI Studies 184, 1977). For detailed background, see U. Kim, A Benefit-Cost Approach to Water Resource Investments: Theory and Its Application (unpublished paper, Dep't of Economics and Business Management, Cath. U., Washington, D.C.).

[48] Rice & Hodgson, *supra* note 30, at 13.

[49] For further discussion of the arbitrary choice of discount rates, see W. Prunella, *supra* note 44, at 4.

[50]
> If the discount rate were 5 percent . . . 1 case [of poisoning by chemicals] today would be valued the same as 1730 cases occuring in 200 years, or the same as the current world population (more than 3 billion cases) in 450 years. Clearly, intergenerational effects of these magnitudes are ethically unacceptable, yet they might be made to appear acceptable if the traditional social rate of discount concept were applied. There is as yet no generally accepted method for weighting the intergenerational incidence of benefits and costs.

CHEMICALS REPORT, *supra* note 2, at 43.

[51] For a brief expression of this concern by the National Academy of Sciences' Committee on the Biological Effects of Ionizing Radiations, see RADIATION REPORT, *supra* note 16, at 68-70.

Analysts and decisionmakers using cost-benefit analysis recognize these implications. Nonetheless, in the absence of public policy directives, analysts frequently apply personal assumptions about the allocation of costs and benefits while calling for objective "fairness" in dealing with distributional problems.[52] Thus according to Stokey and Zeckhauser:

> 1. A program should be adopted when it will yield benefits to one group that are greater than the losses of another group, provided that the two groups are in roughly equivalent circumstances and the changes in welfare are not of great magnitude. . . .
> 2. If the benefits of a proposed policy are greater for one group than the costs for another group, and if it redresses the discriminatory effects of earlier policy choices, that policy should be undertaken. . . .
> 3. It is not so clear whether policies should be undertaken if they will benefit some groups only by imposing significant costs on others. It is sometimes proposed that a policy change should be adopted if and only if it passes a two-part test: (a) it yields positive net benefits, and (b) the redistributional effects of the change are beneficial. . . .[53]

Such earnest analytical approaches to determining fair distributions of costs and benefits[54] ignore constitutional precepts underlying public sector decisionmaking. Constitutional guarantees of due process, equal protection, property rights, and representative government should carry greater weight in solving the distributional problem than assumptions about fairness developed by economists and analysts.

Issues of temporal distribution, involving the allocation of costs and benefits for future generations, transcend even these constitutional values. Future generations possess neither present interests nor designated representatives to advance those interests. Our laws and values favor current benefits to those that accrue later. Cost-benefit analysis also reflects a preference for current benefits over future ones.[55] Distribution over time, therefore, like the discount rate, is essentially an ethical issue for the nation. The assumptions that analysts must make about temporal distributions in using cost-benefit analysis are inadequate precisely because analysts, and not society, have made them.[56]

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[52] *See* Lucas, *Dividing Up the Pie*, 13 ENGINEERING: CORNELL Q. 17 (1978).

[53] STOKEY & ZECKHAUSER, *supra* note 3, at 281-82. See also the assumptions in D. HARRISON, WHO PAYS FOR CLEAN AIR 127-34 (1975).

[54] Cost-benefit analysis practitioners often obscure the distributional effects on specific population sectors in reaching "societally optimal" decisions. Environmental Impact Statements of NRC, for example, usually state that no undue distribution of costs and benefits will occur from a proposed power plant. But the underlying health effects analyses reveal that the most harmful exposures to ionizing radiation occur in the plant environs, whereas most of the benefits from the energy will be distributed in a broader geographic region. *See* Brookhaven Report, *supra* note 17, at 75-134.

[55] The choice of a particular discount rate can make long-term costs and benefits virtually irrelevant to the decisionmaking process. For example, at a discount rate of 10% per year, the present value of one dollar's worth of benefit or cost received 10 years in the future is only 39 cents, received in 20 years its present value is only 15 cents, in 30 years, six cents. L. ANDERSON & R. SETTLE, BENEFIT-COST ANALYSIS: A PRACTICAL GUIDE, Table A-1 at 128 (1977).

E. Promoting Self-Interest and Other Analytical Temptations

Users of cost-benefit analysis can easily play a "numbers game" to arrive at decisions that promote or justify agency actions reached on other grounds.[57] The purportedly objective framework of cost-benefit analysis can be used to promote rather than to analyze options by manipulating the discount rate, assigning arbitrary values to identified costs and benefits, excluding costs that would tilt the outcome against the preferred option, and using self-serving assumptions about distributional fairness. Indeed, the very use of cost-benefit analysis leads some observers to conclude that the action under consideration is scheduled for approval.[58] Even self-corrective measures are suspect. For example, the use of safety factors[59] ostensibly chosen to avoid certain effects may prove to be a facile solution that does not alter the preferred analytical result if these factors are determined only *after* completing a preliminary analysis. Furthermore, these factors are usually based on technical estimates and do not properly consider the value-laden aspects of large, irreversible risks.

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[56] For futher discussion, see JOINT ECONOMIC COMM., 94TH CONG., 2D SESS., FAST BREEDER REACTOR DECISION: AN ANALYSIS OF LIMITS AND THE LIMITS OF ANALYSIS 2 (Comm. Print 1976), dealing with the "heroic assumptions" that discredit cost-benefit analyses on the breeder reactor program; CHEMICALS REPORT, *supra* note 2, at 42-43; RADIATION REPORT, *supra* note 16, at 68-69, 111.

The common use of "willingness to pay" valuation to quantify benefits and costs in dollars raises an additional distributional issue. Willingness to pay, of course, is directly related to ability to pay. The interests of lower income groups therefore will be underrepresented in cost-benefit analysis decisionmaking. If the underlying distribution of income is changed, willingness to pay for benefits and costs may likewise change. *See* L. ANDERSON & R. SETTLE, *supra* note 55, at 11-12.

[57] The decision permitting regular Concorde flights into the United States provides a striking example of how the institutional bias of the analyst may determine the outcome of the balancing process, particularly when subjective and incomparable factors predominate. EPA, Council on Environmental Quality (CEQ), and Federal Energy Administration (FEA) each found the costs of expanded Concorde operations to outweigh the benefits of the proposed flights. After applying cost-benefit analysis to the same data, however, the Federal Aviation Administration, Department of State, and National Aeronautics and Space Administration concluded that Concorde flights were justified. *See* Note, *The Concorde Calculus*, 45 GEO. WASH. L. REV. 1037, 1061-63 (1977). *See also* Green, *Cost-Risk Benefit Assessment and the Law: Introduction and Perspective, id.* at 901.

[58] Burke Zimmerman, Staff Scientist for the House Subcommittee on Health and the Environment, remembers "no instance where risk-benefit analysis resulted in the conclusion that an [agency] action should be stopped." Zimmerman, *Risk-Benefit Analysis: The Cop-Out of Governmental Regulation*, 14 TRIAL 43, 46 (1978).

[59] Self-corrective measures may include allowing a wide margin of safety or delaying decisions until additional information reduces uncertainties. For a discussion of these techniques in the area of DNA research, see *Recombinant DNA, supra* note 18, at 66-67, 83-84.

In addition, the "technology-forcing function" of regulatory programs can be stifled by limited technical and economic information. Governmental officials must often rely on the regulated industry for news of recent technological developments. Industry information is likely to be unduly pessimistic about the costs, reliability, and availability of new techniques. Thus, cost-benefit analysis based upon industrial information may become a mechanism for economically convenient regulation that tends to perpetuate the technological status quo. This result is particularly predictable when regulatory agencies have not defined their objectives. If such objectives were established initially, they would "drive" the regulatory process and more readily force development of new technology.[60]

F. Special Problems of Accountability

The use of cost-benefit analysis raises new issues in addition to the usual problems of ensuring agency accountability to the courts, Congress, the President, and the public. Certainly the jargon, presumably objective numbers, and analytical complexities of cost-benefit analysis obscure the subjective assumptions, uncertain data, and arbitrary distributions and valuations of the decisionmaking process, thereby preventing meaningful review of agency activity. Agency uses of cost-benefit analysis tend to promote the role of experts and diminish the participatory and review roles of nonexperts.[61]

Senator Muskie has voiced his concern about agencies including "questionable benefits" that can make projects appear "economically sound."[62] He has called for evaluating projects at different stages of completion "to find if the validity of benefits claimed at project authorization can be reaffirmed during and after construction."[63] No governmental agency has adopted this approach despite its obvious value in improving subsequent uses of cost-benefit analysis.

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[60] *See* RADIATION REPORT, *supra* note 16, at 109-11; [1975] 6 ENVIR. REP. (BNA) — MONOGRAPHS NO. 21.

[61] See Senator Muskie's letter requesting that "the general methodology of the benefit-cost ratio analysis as carried out by the Corps of Engineers . . . be investigated," and that "the use of probability analysis in the calculation of benefits for water resources projects . . . be reviewed." Muskie letter to GAO, *supra* note 3, at 19. The subsequent report of the General Accounting Office calling for reforms in the Corps' presentation of alternatives is not responsive to the Muskie request. *See* U.S. GENERAL ACCOUNTING OFFICE, IMPROVED FORMULATION AND PRESENTATION OF WATER RESOURCES PROJECT ALTERNATIVES PROVIDE A BASIS FOR BETTER MANAGEMENT DECISIONS (Feb. 1, 1978). See also numerous NRC Regulatory Guides and Environmental Impact Analyses. For example, NRC's Environmental Statement on the Tyrone Energy Park (Apr. 1977) (NUREG-0226) contains extensive cross-references to technical analyses, reports, and other background cost-benefit analyses and information adopted by NRC. One of the critical issues, however, is dealt with by a simple concluding sentence disconnected from the foregoing analysis: "The staff concludes that the distribution of costs and benefits does not place unreasonable costs on any segment of the population." *Id.* at 10-24. The cost-benefit approaches of NRC and the National Bureau of Standards are examples of complex regulatory decision records that are virtually incomprehensible and unreviewable except by highly persistent and technically sophisticated individuals.

In its cost-benefit analysis of nuclear reactor licensing decisions, NRC estimates the population that will live near the reactor site in the future. Yet neither NRC nor any other governmental body attempts to control actual population growth in the areas surrounding nuclear plants. Thus the estimated cost-benefit basis for approving a proposed activity is not used as a planning tool for maintaining predicted costs and benefits once the activity is undertaken. The actual costs and benefits consequently may vary considerably from those projected in the analysis.[64]

Additionally, the combination of fragmented regulatory jurisdiction over pervasive problems and increased agency reliance on cost-benefit analysis ultimately leads to increased societal risk. For example, a trace metal such as mercury constitutes a health and environmental quality hazard. It is regulated by several agencies, including the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA), Consumer Product Safety Commission (CPSC), and Food and Drug Administration (FDA). Each agency may permit some activity introducing an additional incremental amount of the pollutant into the environment because the minor amount of calculable human exposure or environmental harm in each instance is offset by a broad range of postulated societal benefits. Even though each agency may be making careful and objective decisions, without overall interagency accounting for the increasing risk to the general population and the environment from these many small decisions, the total societal risk will continue to aggregate.[65]

The above taxonomy of methodological problems reveals the need for a "best efforts" approach, fostered by Congress and the President, and administered by the agencies and the courts, to exclude the use of cost-benefit analysis under certain conditions and to resolve rational and humanistic concerns. This best efforts approach should focus on: (1) improving the technical and objective quality of cost-benefit analysis; (2) establishing the limits and societal implications of cost-benefit analysis; (3) improving public participation; and (4) designing more effective measures for congressional and executive oversight of agency practices.

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[62] Muskie letter to GAO, *supra* note 3, at 19.

[63] *Id.*

[64] Baram, *An Assessment of the Use of Cost-Benefit Analysis in Regulatory Agency Decision Making* in RETROSPECTIVE TECHNOLOGY ASSESSMENT—1976, at 20 (J. Tarr ed. 1977). This article is based in part on an analysis of various NRC enforcement deficiencies and practical problems discussed in RADIATION REPORT, *supra* note 16.

[65] *See* Baram, *Regulation of Environmental Carcinogens: Why Cost-Benefit Analysis May Be Harmful to Your Health*, 78 TECH. REV. 41 (1976).

III

AGENCY USES OF COST-BENEFIT ANALYSIS UNDER STATUTORY MANDATE

Congress and the Office of the President have fostered the use of cost-benefit analysis in regulatory decisionmaking through statutes[66] and Executive orders[67] that either expressly require it or call for balancing of competing considerations. This section reviews these mandates and agency experience with cost-benefit analysis. NEPA is discussed initially because it is a general source of authority for all federal agencies to perform balancing analyses, and because it has generated extensive litigation on the cost-benefit issue.

Although Congress frequently requires regulatory agencies to balance multiple societal objectives in their decisionmaking, it has not provided guidance for structuring agency discretion on these substantive matters. At the most basic level, Congress should address the relative importance of factors in the balancing process, including the classic problems of valuation, discount rates, distribution of costs and benefits, and the analytical framework to be used in reaching decisions. By failing to provide this legislative guidance, Congress has exposed the agencies to unnecessary litigation.[68]

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[66] The Congressional Office of Technology Assessment has determined that cost-benefit analysis is required or permitted in agency decisionmaking under many of the regulatory provisions of the following statutes: Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§ 135-136y (West 1964 & Supp. 1979); Federal Hazardous Substances Act, 15 U.S.C.A. §§ 1261-1275 (West 1974 & Supp. 1979); Consumer Product Safety Act, 15 U.S.C.A. §§ 2051-2082 (West 1974 & Supp. 1979); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976 & Supp. I 1977); Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. §§ 301-392 (West 1972 & Supp. 1979); Occupational Safety and Health Act of 1970, 29 U.S.C.A. §§ 651-678 (West 1975 & Supp. 1979); Clean Water Act, 33 U.S.C.A. §§ 1251-1376 (West 1978 & Supp. 1979); Clean Air Act, 42 U.S.C.A. §§ 7401-7642 (West Supp. 1978). *See* Office of Technology Assessment, U.S. Congress, Cancer Testing Technology and Saccharin 16 (Oct. 1977).

[67] See note 21 *supra*.

[68] For example, the court in Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), ruling on the scope of balancing required by § 111 of the Clean Air Act, held that EPA need not carry out a quantified cost-benefit analysis in support of its performance standards for new sources. In Union Electric v. EPA, 427 U.S. 246 (1976), the Supreme Court interpreted § 110(a)(2) of the Act as barring the consideration of economic and technological infeasibility when the EPA Administrator reviews and approves a State Implementation Plan.

A. *The National Environmental Policy Act and Cost-Benefit Analysis*

The National Environmental Policy Act of 1969 (NEPA)[69] requires federal agencies to consider environmental quality as an integral part of their decisionmaking. The "action-forcing" requirement of section 102(2)(C) provides that each agency must prepare an environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment."[70] The EIS must provide a detailed account of the expected beneficial and adverse impacts of the proposed action on the environment and evaluate possible alternatives to the action.

Sections 102(2)(A) and (B) also play a major role in the development of cost-benefit analysis under NEPA, although unlike section 102(2)(C), they contain no enforceable mandate. These two provisions require all federal agencies to:

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality, . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.[71]

In *Calvert Cliffs' Coordinating Committee v. AEC*[72] the District of Columbia Circuit construed these provisions to require balancing of environmental benefits in relation to economic and technical factors. Interpreting NEPA's requirement that these factors be weighed in a "detailed statement,"[73] the court stated: "NEPA mandates a case-by-case balancing judgment on the part of the federal agencies. In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values."[74]

The court did not, however, prescribe any particular methodology, such as fully quantified cost-benefit analysis, for carrying out this balancing analysis. Later opinions concerning EIS's prepared pursuant to NEPA have adhered to the balancing requirement without insisting on quantification or monetization of environmental values.[75]

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[69] 42 U.S.C.A. §§ 4321-4369 (West 1977 & Supp. 1979).

[70] NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976).

[71] *Id.* § 102(2)(A), (B), 42 U.S.C. § 4332(2)(A), (B).

[72] 449 F.2d 1109 (D.C. Cir. 1971).

[73] NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976).

[74] 449 F.2d at 1123.

[75] *See* Leventhal, *supra* note 10, at 529.

The Council on Environmental Quality (CEQ), established to assist in the implementation of NEPA,[76] has failed to provide useful guidance on the balancing requirement. An Executive order[77] authorized CEQ to issue regulations, rather than mere guidelines, concerning preparation of EIS's and the resolution of interagency conflicts, but CEQ has not used these extended powers to guide the development of cost-benefit analysis methodology under NEPA. Further, CEQ's final regulations for NEPA, promulgated in response to Executive Order 12044,[78] fail to set guidelines on critical methodological issues.[79]

Meaningful CEQ guidelines would provide agencies with a more rational, consistent framework for addressing methodological problems posed by NEPA. But CEQ alone cannot resolve these thorny questions. Congress eventually must address problems of "valuing" intangibles such as human health and environmental amenities. Moreover, Congress could improve the NEPA balancing process by defining the weight to be afforded EIS results. Congress, for example, could amend NEPA to confirm NRC's interpretation that an agency may select any alternative with a positive EIS cost-benefit ratio unless an "obviously superior" alternative exists,[80] or Congress could require

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[76] Council on Environmental Quality Act, Pub. L. No. 91-190, 83 Stat. 854 (codified at 42 U.S.C. § 4342 (1976)).

[77] Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (1977).

[78] See text accompanying notes 172-79 *infra*.

[79] *See* 40 C.F.R. § 1502.23 (1979).

> If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with sec. 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

Id.

[80] After completion of cost-benefit analysis in evaluating power plant sites, a further issue inevitably arises: whether NRC should select the proposed site if it is reasonably acceptable or only if it is the best site. NRC, under its own regulations requiring cost-benefit analysis under NEPA, has determined that the best site need not be chosen, but that the proposed site can be chosen if the results of the cost-benefit analysis are favorable and no "obviously superior site" is an alternative. Brookhaven Report, *supra* note 17, at 105-06.

In its decision on Seabrook Station, the Commission determined that:

> [I]t would be unreasonable to say that environmental advantages automatically take precedence.
>
> . . . [A]s the *Calvert Cliffs* decision noted, "Congress did not establish environmental protection as an exclusive goal."
>
> . . . Two significant realities of the NEPA process support the use of the standard of obvious superiority—the inherent imprecision of cost/benefit analysis and the probability that more adverse information has been developed respecting the closely examined proposed site than any alternatives. The imprecision springs

selection of the most favorable alternative. Absent clarification from Congress, CEQ, or the courts, agencies conducting a balancing analysis under NEPA retain considerable discretion on methodological and related procedural issues.

Lack of Congressional guidance also allows agencies to make the initial decision about which actions are subject to the EIS requirement. Although NEPA expressly provides for environmental impact assessment of "major federal actions,"[81] it does not distinguish between rulemaking, licensing, and other federal agency actions. Agencies take sharply different positions on the applicability of NEPA's balancing requirements to rulemaking. For example, NRC construes NEPA, together with its own enabling legislation, to authorize a quantified cost-benefit analysis as part of its environmental impact assessment in its rulemaking.[82] On the other hand, EPA does not consider its rulemaking legally subject to NEPA and prepares only a limited number of EIS's on rulemaking actions.[83] Between these two extremes stand agencies such as OSHA, which recognize the applicability of NEPA to its promulgation of health and safety standards,[84] but provides that a qualitative balancing of costs and benefits is sufficient for such actions.[85]

As a result of these uncertainties under NEPA, much of the economic analysis of rulemaking actions is made under the Executive orders discussed in Part IV. These analyses, however, need not meet the

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> from the nature of cost/benefit analysis . . . the factors to be compared range from broad concerns of system planning, safety, engineering, economic and institutional factors to environmental concerns, including ecological, biological, aesthetic, sociological, recreational, and so forth. Much of the underlying cost-benefit data is difficult of articulation, much less quantification. Given these difficulties, any evaluation of a particular site must inevitably have a wide margin of uncertainty. . . . [W]here the data to be compared necessarily present a wide margin of uncertainty, one site must appear to be substantially "better."

In re Public Service Co., 5 NRC 527-28 (1977).

Recognizing the limitations inherent in its use of cost-benefit analysis, NRC has established that cost-benefit analysis provides a rough method for attempting to structure as rational a decision process as possible.

81. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976).

82. See note 126 *infra* and accompanying text.

83. Based on its mandate to protect the environment and specific exemptions in its enabling statutes, EPA claims to be exempt from the EIS requirements of NEPA in many of its rulemaking activities. *See* [1979] 10 ENVIR. REP. (BNA) —MONOGRAPHS NO. 28, at 44. EPA announced that it was not required by law to prepare EIS's for any of its regulatory actions. 39 Fed. Reg. 16,186 (1974). The agency did, however, voluntarily agree to carry out environmental impact analyses in connection with some of its major regulatory decisions on air pollution, noise, radiation, ocean pollution, and pesticide control. 39 Fed. Reg. 37,419 (1974). The District Court rejected a similar NEPA exemption claim made by the Food and Drug Administration in EDF v. Mathews, 410 F. Supp. 336 (D.D.C. 1976).

84. 29 C.F.R. § 1999.2(a) (1979).

85. *Id.* § 1999.4(b). *But cf.* American Petroleum Institute v. OSHA, 581 F.2d 493 (5th Cir. 1978), *cert. granted sub nom.* Marshall v. American Petroleum Institute, 440 U.S. 906 (1979) (OSHA's benzene standard set aside because no *factual* basis for estimating benefits).

public participation and judicial review requirements for cost-benefit analyses prepared under NEPA.

B. Enabling Statutes and Cost-Benefit Analysis

1. Environmental Protection Agency

Statutory vagueness has caused considerable uncertainty as to whether EPA must perform cost-benefit analysis or any other form of balancing when regulating air, water, and radiation. Ordinarily, this uncertainty is resolved under particular statutory provisions only after EPA has acted, when regulated industries bring lawsuits contending that the agency should have relied on a more formal cost-benefit analysis approach. In such cases, earlier clarification of congressional intent would improve EPA's ability to meet its statutory obligations within mandated time periods.

The Clean Air Act,[86] for example, precludes consideration of economic cost in setting standards for hazardous air pollutants,[87] regulating most fuel additives,[88] and establishing national primary and secondary ambient air standards.[89] In other areas of decisionmaking, however, the statute allows consideration of economic costs.[90]

Authority to use cost-benefit analysis in regulating pesticides is more clearly defined. The Federal Environmental Pesticide Control Act of 1972[91] requires the registration of pesticides.[92] Before approving a registration request, EPA must determine that the pesticide "will perform its intended function without unreasonable adverse effects on the environment."[93] These are cost-benefit based determinations because "unreasonable adverse effects on the environment" is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide."[94]

The Toxic Substances Control Act[95] permits EPA to take a balancing approach to the regulation of toxic chemical substances and mixtures by authorizing regulation when there is a reasonable basis to conclude that unregulated manufacturing, distribution, or other activity involving a chemical may "present an unreasonable risk of injury to health or the environment."[96] In promulgating a rule under this section, EPA must develop findings on four factors:

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[86] 42 U.S.C.A. §§ 7401-7642 (West Supp. 1979).

[87] *See* Clean Air Act § 112(b)(1)(B), 42 U.S.C. § 7412(b)(1)(B) (Supp. I 1977).

[88] *Id.* § 211(c)(1)(A), 42 U.S.C. § 7545(c)(1)(A).

[89] *Id.* § 109(b)(1), (2), 42 U.S.C. § 7409(b)(1), (2).

[90] *Id.* § 317, 42 U.S.C. § 7617. The bases for decisionmaking, however, are not altered by consideration of economic costs. See note 68 *supra*.

[91] 7 U.S.C. §§ 136-136y (1976).

[92] *Id.* § 3, 7 U.S.C. § 136(a).

[93] *Id.* § 3(c)(5)(C), 7 U.S.C. § 136a(c)(5)(C).

[94] *Id.* § 2(bb), 7 U.S.C. § 136(bb). EPA's implementing regulations, 40 C.F.R. § 162.11 (1979), define the "costs" associated with a pesticide largely in terms of its toxicity. 41 Fed. Reg. 21,402 (1976) provides additional methodological guidance.

[95] 15 U.S.C.A. §§ 2601-2629 (West Supp. 1979).

> (A) the effects of such substance or mixture on health and the magnitude of the exposure of human beings to such substance or mixture,
>
> (B) the effects of such substance or mixture on the environment and the magnitude of the exposure of the environment to such substance or mixture,
>
> (C) the benefits of such substance or mixture for various uses and the availability of substitutes for such uses, and
>
> (D) the reasonably ascertainable economic consequences of the rule, after consideration of the effect on the national economy, small business, technological innovation, the environment, and public health.[97]

Based on this analysis of costs and benefits, EPA must adopt the "least burdensome" requirements necessary to protect against the risk of injury from the regulated substance.[98]

Under the Noise Control Act of 1972,[99] EPA may establish noise emission standards "requisite to protect the public health and welfare"[100] from major sources of noise for which such standards are "feasible."[101] The standard itself is to be based on best available technology, but additional factors may be considered, including the cost of compliance and the extent and conditions of the product's use.[102]

EPA possesses broad authority to deal with water pollution under the Clean Water Act.[103] Sections of the Act establishing the construction grants program for publicly owned waste treatment works mandate the use of cost-effectiveness analysis.[104] Judicial decisions interpreting section 1314(b)(1) uniformly have rejected industry contentions that EPA must justify the "best practicable technology" (BPT) effluent limitations with a mathematically exact cost-benefit analysis.[105]

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[96] 15 U.S.C. § 2605(a) (Supp. I 1977). For a general discussion of environmental risks presented by toxic chemicals, see Page, *A Generic View of Toxic Chemicals and Similar Risks*, 7 ECOLOGY L.Q. 207 (1978).

[97] 15 U.S.C. § 2605(c)(1) (Supp. I 1977).

[98] *Id.* § 2605(a).

[99] 42 U.S.C.A. §§ 4901-4918 (West 1977 & Supp. 1979).

[100] Noise Control Act § 6(c)(1), 42 U.S.C. § 4905(c)(1) (Supp. I 1977).

[101] *Id.* § 6(a)(1)(A), (B), 42 U.S.C. § 4905(a)(1)(A), (B) (1976).

[102] *Id.* § 6(c)(1), 42 U.S.C. § 4905(c)(1) (Supp. I 1977).

[103] 33 U.S.C. §§ 1251-1376 (1976 & Supp. I 1977).

[104] Clean Water Act § 201(g)(5), 33 U.S.C. § 1281(g)(5) (Supp. I 1977).

[105] *See* E.I. duPont de Nemours & Co. v. Train, 541 F.2d 1018, 1030 (4th Cir. 1976), *modified on other grounds*, 430 U.S. 112 (1977); American Petroleum Institute v. EPA, 540 F.2d 1023, 1037-38 (10th Cir. 1976). *See also* Kalur, *Will Judicial Error Allow Industrial Point Sources to Avoid BPT and Perhaps BAT Later: A Story of Good Intentions, Bad Dictum, and Ugly Consequence*, 7 ECOLOGY L.Q. 955 (1979).

Courts instead have found that EPA's use of cost-effectiveness analysis to determine best practicable technology satisfied the statute; EPA need not quantify benefits in monetary terms.

Similar controversy has arisen over EPA's authority to control effluent discharges by 1983 through the so-called best available technology (BAT) standards. In setting BAT standards, EPA is required to consider the cost of achieving the desired effluent reduction, but it is not required to balance costs against benefits as it is under the BPT provision. By expressly requiring cost-benefit analysis under BPT but not under BAT,[106] it appears that Congress intended to tolerate a greater disparity between costs and apparent benefits under the BAT standards than under the BPT standards.

In *American Iron & Steel Institute v. EPA*,[107] the Third Circuit approved this interpretation of the BAT standards, noting that costs need not explicitly be compared to benefits and that the Administrator may exercise considerable discretion in weighing costs for purposes of defining BAT, provided that his decisions are reasonable.[108] The Fourth Circuit adopted a significantly different view of the BAT requirements in *Appalachian Power Co. v. Train*,[109] setting aside EPA's thermal backfit regulations for steam electric power plants. The court concluded that the BAT provisions require EPA to compare the benefits of thermal effluent limitation with costs for alternative levels of heat reduction in order to justify standards based on best available technology economically achievable.[110] To date, however, no other circuit has followed *Appalachian Power*. Moreover, the balancing analysis mandated by *Appalachian Power* does not require any radical shift in EPA's analytical technique. The court recognized that a quantified analysis of costs and benefits would be unworkable.[111] Accordingly, on remand, EPA was required only to *state* the benefits, especially those to aquatic life, associated with the various alternatives to be considered.[112] Wherever benefits cannot be stated, the court ruled that EPA must support that assertion with a scientific opinion.[113]

EPA is also subject to NEPA's general mandate that agencies consider the environmental impact of proposed major actions and evaluate alternatives to such actions. In one of its rare applications of NEPA's EIS provisions, EPA prepared a "voluntary" EIS in connection with its radiation standard for the uranium fuel cycle.[114] This document illustrates in detail EPA's application of cost-benefit techniques to the regulation of environmental radiation. Congressional silence about the applicability of NEPA to EPA regulatory activities, coupled with EPA's failure to establish a standard policy concerning its use of quantified balancing analyses, has led to varied cost-benefit analysis approaches to its rulemaking—some required by statute, others voluntarily undertaken, and all without meaningful congressional or agency guidance on critical methodological issues.[115] This brief review of EPA authority to use cost-benefit analysis in its regulatory decisionmaking process demonstrates the substantial confusion resulting from various statutory mandates.

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[106] Clean Water Act § 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B) (1976), states that the factors to be used in evaluation of the BPT "shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." In contrast, assessment of factors in determining the BAT "shall take into account . . . the cost of achieving such effluent reduction." *Id.* § 304(b)(2)(B), 33 U.S.C. § 1314(b)(2)(B).

[107] 526 F.2d 1027 (3d Cir. 1975).

[108] *Id.* at 1051-52.

[109] 545 F.2d 1351 (4th Cir. 1976).

[110] *Id.* at 1361.

[111] *Id.*

[112] *Id.* at 1365.

[113] *Id.* at 1364.

2. *Nuclear Regulatory Commission*

The major statutory sources of NRC authority, The Atomic Energy Act of 1954[116] and the Energy Reorganization Act of 1974,[117] do not expressly require NRC to use cost-benefit analysis in setting standards for nuclear power activities or licensing reactors. Nevertheless, NRC extensively uses cost-benefit analysis in its rulemaking, licensing, and other nuclear power plant control activities. This raises two unresolved questions: (1) whether NRC has statutory authority and discretion to balance competing considerations in establishing standards for radiation emission controls; and (2) whether NRC should use cost-effectiveness analysis instead of cost-benefit analysis.

The NRC's predecessor, the Atomic Energy Commission (AEC), used cost-benefit analysis in setting standards and issuing licenses under the implied authority of the 1954 Act and the recommendations of expert advisory groups. The purpose of the 1954 Act was to foster research and development of atomic energy to promote national security and industrial progress, subject to appropriate safeguards to protect public health and safety.[118] Given these multiple objectives, AEC could imply a duty to balance developmental interests against health and safety in making decisions.

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[114] *See* OFFICE OF RADIATION PROGRAMS, U.S. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL RADIATION PROTECTION REQUIREMENTS FOR NORMAL OPERATIONS OF ACTIVITIES IN THE URANIUM FUEL CYCLE, FINAL ENVIRONMENTAL IMPACT STATEMENT (Nov. 1, 1976) (EPA Rep. No. 520/4-76-016).

[115] See text accompanying notes 232-37 *infra* for further discussion of EPA's use of cost-benefit analysis.

[116] Ch. 1073, 68 Stat. 919 (1954) (current version at 42 U.S.C.A. §§ 2011-2296 (West 1973 & Supp. 1979)).

[117] 42 U.S.C.A. §§ 5801-5891 (West 1977 & Supp. 1979).

[118] *See* ch. 1073, § 3, 68 Stat. 922 (1954) (current version at 42 U.S.C. § 2013 (1976)).

The AEC adopted the recommendations of several independent advisory groups that cost-benefit methods be employed for setting standards to control exposure to ionizing radiation. The Federal Radiation Council[119] recommended that licensees reduce exposures and releases of radioactive materials "as low as is reasonably achievable," taking into account "the state of technology, and the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations."[120] The AEC adopted this recommendation.[121]

In *Crowther v. Seaborg*,[122] a federal court considered the validity of AEC radiation standards and reviewed its standard-setting process, which "requires the weighing of . . . risks and benefits."[123] The court noted:

> [W]eighing requires a value judgment as well as a measuring, and thus the standards are not scientific numbers below which no danger exists. The value judgment embodies complex social and political considerations, for atomic energy has a potential that suggests unlimited benefits to entire nations and presents a risk to entire populations . . . and perhaps their progeny.[124]

The court upheld the AEC standards and standard-setting practices, relying on the "strong presumption of the validity and regularity of the standards when administrative officials decide weighty issues within the specific area of their authority and the burden is on the plaintiffs to overcome this presumption."[125]

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[119] The Federal Radiation Council, a presidential advisory group, was terminated in 1970 and its functions transferred to EPA. Reorg. Plan No. 3 of 1970, 3 C.F.R. 1075 (1966-1970 Compilation), *reprinted in* 5 U.S.C. app., at 828 (1976) *and in* 84 Stat. 2088 (1970-1971).

[120] 10 C.F.R. § 20.1(c) (1979).

[121] *Id.*

[122] 312 F. Supp. 1205 (D. Colo. 1970).

[123] *Id.* at 1231.

[124] *Id.*

[125] *Id.* at 1234. Following this judicial affirmation of AEC practices, the National Academy of Sciences' Committee on the Biological Effects of Ionizing Radiations (the BEIR Committee), offered several recommendations for the control of ionizing radiation, including that "[n]o exposure to ionizing radiation should be permitted without the expectation of a commensurate benefit." NATIONAL ACADEMY OF SCIENCES, THE EFFECTS ON POPULATIONS OF EXPOSURE TO LOW LEVELS OF IONIZING RADIATION 2 (1972).

In 1973, the International Commission of Radiological Protection (ICRP) similarly recommended that regulation of doses of radiation be "low enough to satisfy both of two interrelated conditions: (a) the doses should be as low as is reasonably achievable, economic and social considerations being taken into account; and (b) the doses should be justifiable by the expected benefits of the procedures." International Commission on Radiological Protection, Pub. No. 22, Implications of Commission Recommendations that Doses Be Kept as Low as Readily Achievable 5 (1973). The ICRP recommendations of 1973 further provided that "[t]he acceptability of levels of exposure to radiation for a given activity should be determined by a process of cost-benefit analysis."

In the early 1970's, the AEC initiated proceedings to enhance the use of cost-benefit analysis in its radiation programs. These proceedings, incomplete at the time of AEC's abolition and creation of the NRC in 1974, were completed by the NRC in 1974 and resulted in the adoption of Appendix I. Appendix I, included in NRC regulations,[126] remains the fundamental source on analytical approaches for NRC rulemaking and other regulatory activities applicable to radiation. There has not been any apparent NRC modification of this analytical approach despite passage of the Energy Reorganization Act of 1974.[127]

It can be argued that the 1974 Act, which transferred many of AEC's functions to NRC, simply did not allow NRC to continue AEC's brand of decisionmaking as affirmed in *Crowther v. Seaborg* in 1970.[128] Moreover, the 1974 Act arguably impaired the ability of NRC to use cost-benefit analysis in its health and safety regulatory practices. Because the new Energy Research and Development Administration (ERDA) fosters developmental activities, while NRC pursues the single objective of ensuring public health and safety, NRC should not use cost-benefit analyses to ensure development of nuclear power. Arguably, under the 1954 and 1974 Acts, NRC lacks clear statutory authority to develop standards through cost-benefit based regulation. Furthermore, the EPA's off-site maximum exposure standards for radiation[129] "regulate the NRC" by providing the ultimate limitations on nuclear power. It follows that the NRC role in setting ionizing radiation emission and other standards is restricted to ensuring that the radiation emanating from any plant does not surpass the EPA limits. If this interpretation is correct, the NRC's use of cost-benefit analysis and its valuation of broad societal and economic factors in establishing standards is unwarranted. Under these EPA limits, however, NRC could use a cost-effectiveness approach to source regulation. This would be consistent with the requirements of NEPA[130] and various Executive orders.[131]

NRC also employs a balancing analysis in its review of nuclear power plant construction and operating permit applications. The balancing analysis required by NEPA[132] has been shaped by subsequent judicial[133] and NRC determinations,[134] and various economic, social, environmental and institutional constraints.[135] NEPA requirements for considering the economic and technical implications as well as the environmental effects of major federal actions can be construed as authorizing NRC use of cost-benefit analysis in the licensing of reactors. However, NRC recognizes that such reviews essentially are now cost-effectiveness analyses, given that all these constraints must be built into their analyses.

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[126] 10 C.F.R. pt. 50 app. I (1979).

[127] 42 U.S.C.A. §§ 5801-5891 (West 1977 & Supp. 1979). The Act abolished AEC and generally transferred its functions to ERDA. 42 U.S.C. § 5814 (a), (c) (1976). One exception to this general authorization was the transfer to NRC of the licensing and related regulatory functions of AEC. *Id.* § 5841(f).

[128] 312 F. Supp. 1205 (D. Colo. 1970). See text accompanying notes 122-25 *supra*.

[129] 10 C.F.R. pt. 50 app. I (1979).

[130] See text accompanying notes 69-85 *supra*.

[131] See note 21 *supra*. See also text accompanying notes 136-206 *infra*.

[132] NEPA § 102(2)(A), (B), 42 U.S.C. § 4332(2)(A)(B) (1976). See text accompanying notes 69-71 *supra*.

IV

COST-BENEFIT ANALYSIS UNDER EXECUTIVE ORDERS

Several Executive orders requiring economic analysis in agency rulemaking have promoted agency use of cost-benefit analysis. Under these orders, the President's Office of Management and Budget (OMB), Council of Economic Advisors (CEA), Council on Wage and Price Stability (COWPS), Office of Science and Technology Policy (OSTP), and several Presidential aides play increasingly significant and controversial roles in forcing regulatory agencies to use cost-benefit analysis to solve health, safety, and environmental problems. Thus regulatory agencies carrying out their congressional mandates must justify proposed rules on health, safety, and environmental protection by demonstrating to the President that the expected benefits will exceed the expected costs.

A. Ford Administration "Inflationary Impact" Executive Orders

President Ford's Executive Order 11821,[136] amended by Executive

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[133] Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). See text accompanying notes 72-75 *supra*.

[134] 10 C.F.R. § 51 (1979). *See also* U.S. Nuclear Regulatory Commission, Preparation of Environmental Reports for Nuclear Power Stations, Regulatory Guide 4.2, Revision 2, NUREG-0099 (July 1976).

[135] U.S. Nuclear Regulatory Commission, Preparation of Environmental Reports for Nuclear Power Stations, Regulatory Guide 4.2, Revision 2, NUREG—0099, at viii (July 1976). Many federal health, safety, and environmental regulatory agencies other than EPA and NRC use cost-benefit analysis in their decisionmaking process. Thus, the problems of a proper discount rate, valuation of human life and other unquantifiable factors, arbitrary manipulation of variables, and the distribution of costs and benefits across populations and over generations also affect the quality of regulatory action taken by such agencies as the Food and Drug Administration, Consumer Product Safety Commission, Army Corps of Engineers, Bureau of Reclamation, Federal Aviation Administration, and the Occupational Safety and Health Administration. For a thorough review of these agencies' experience with cost-benefit analysis and the methodological limitations of the analytical technique, see M. Baram, Regulation of Health, Safety and Environmental Quality and the Use of Cost-Benefit Analysis, (Mar. 1, 1979) (final report to the Administrative Conference of the United States).

[136] 3 C.F.R. 926 (1971-1975 Compilation).

Order 11949,[137] directed federal regulatory agencies to consider the inflationary impact of "all major legislative proposals, regulations, and rules emanating from the executive branch of the Government."[138] OMB, which held general oversight responsibility for the Inflationary Impact Statement (IIS) programs,[139] guided the agencies in developing criteria for identifying "major" actions and developing procedures for evaluating inflationary impact.

The OMB guidelines recommending that agencies use cost-beneift analysis to determine inflationary impact[140] appear to have had limited effect on agency decisions.[141] Since agencies had to prepare impact statements only for "major" rulemaking proposals, individual regulations frequently fell beyond the reach of the IIS.[142] As a result, logically unified programs like the Standards Completion Project of the Occupational Safety and Health Administration (OSHA), involving over 300 individual regulations governing worker exposure to chemicals, escaped cost-benefit analysis.[143]

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[137] 3 C.F.R. 161 (1977 Compilation).

[138] 3 C.F.R. 926 (1971-1975 Compilation).

[139] Executive Order 11949, 3 C.F.R. 161 (1977 Compilation), amended the term "inflationary impact statement" to "economic impact statement." In this Article, however, the earlier term is used and abbreviated as IIS, in order to avoid confusion with the term "environmental impact statement" (EIS), which occurs throughout the Article.

[140] Office of Management and Budget, U.S. Executive Office of the President, Circular No. A-107 *re* Evaluation of the Inflationary Impact of Major Proposals for Legislation and for the Promulgation of Regulations of Rules (Jan. 28, 1975). Such evaluations include, where applicable:

> (1) an analysis of the principal cost or other inflationary effects of the action on markets, consumers, businesses, etc., and, where practical, an analysis of secondary cost and price effects. These analyses should have as much quantitative precision as necessary and should focus on a time period sufficient to determine economic and inflationary impacts.
>
> (2) a comparison of the benefits to be derived from the proposed action with the estimated costs and inflationary impacts. These benefits should be quantified to the extent practical.
>
> (3) a review of alternatives to the proposed action that were considered, their probable costs, benefits, risks, and inflationary impacts compared with those of the proposed action.

Id. at 2.

[141] This judgment was reached after numerous personal discussions with personnel in OMB and several agencies in Washington, D.C. (1978).

[142] Early review of the IIS program revealed inadequacies in agency procedures for identifying major and minor regulatory actions. OMB proposed a measure to tighten up the identification process:

> 1. Agencies must state in the Federal Register at the time of publication that minor rules and regulations (that is, those whose impacts do not exceed the IIS criteria) have been reviewed and do not require an IIS. A similar statement should be made in correspondence to OMB for legislative proposals deemed to be minor.
> 2. Upon request from the Council on Wage and Price Stability (COWPS), an agency must provide a brief description of its reasons for concluding that a proposed action is minor.

Office of Management and Budget, U.S. Executive Office of the President, Memorandum *re* Changing IIS Requirements (June 11, 1976).

OMB eventually established a numerical threshold to define "major" action. Regulations with an expected economic impact of $100 million per year were classifed as major,[144] and hence required an IIS. The agencies, however, proved adept at getting around this new requirement by spacing out the effect of important regulations over several years and by dividing regulatory programs so that effects of individual components fell below the $100 million threshold.[145]

NRC, already using cost-benefit analysis, chose not to implement the Executive orders and OMB guidelines. Its officials asserted that NRC was an independent commission not subject to these executive requirements, and that its sensitive task of controlling substantial radiation hazards should not be shaped by inflationary impact considerations.[146] Agency analysts expressed difficulties in integrating IIS analysis and procedures with preexisting regulatory analyses derived from statutory mandates and administrative practices.[147]

Agencies such as EPA and OSHA, which administer statutes that allow only limited consideration of economic factors, viewed the IIS procedure as an unnecessary requirement inhibiting implementation of their statutory mandates and adding to their already considerable administrative burdens.[148] Furthermore, OMB and the agencies did not require the IIS and background analytical documents to be included in the decision record, and therefore subject to public disclosure and eventual judicial review under the requirements of the Administrative Procedure Act[149] and Freedom of Information Act.[150] Thus, the IIS procedure avoided the public participation and judicial review that could ensure accountable agency use of cost-benefit analysis.[151]

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[143] Although an EIS was prepared for the entire project, 39 Fed. Reg. 33,843 (1974), economic analyses were only prepared for subgroups within the project. *See, e.g.*, 41 Fed. Reg. 29,425 (1976).

[144] Office of Management and Budget, U.S. Executive Office of the President, Memorandum *re* Uniform Criteria (June 3, 1975).

[145] Interviews with OMB and COWPS staff in Washington, D.C. (Fall 1978).

[146] *Id.*

[147] *Id.*

[148] EPA, in particular, regarded the program with special skepticism because it was administered by OMB. EPA had been the main focus of the Nixon Administration's "Quality of Life" review. According to some observers, OMB used this review process to diminish EPA achievements in protecting environmental quality and to delay important actions. *See* [1976] 7 ENVIR. REP. (BNA) 693.

[149] 5 U.S.C. §§ 500-703 (1976).

[150] *Id.* § 552.

[151] Despite these shortcomings, the IIS program might have influenced agency decisionmaking considerably if courts enforced the requirements of Executive Order 11821 in private lawsuits. In Independent Meat Packers v. Butz, 526 F.2d 228 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976), the court held that private parties cannot enforce the requirement to prepare an IIS because the IIS program "was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal frame-

These inadequacies of the IIS process were significant since OMB supervision guided the cost-benefit analysis practices of many federal agencies. As a result, wide variation in agency practice developed. The Federal Energy Administration (FEA), for example, concluded that its procedures for economic analysis developed in response to the IIS Executive orders satisfied its statutory obligations.[152] Other agencies prepared IIS pursuant to NEPA or other statutory authority, subject to various procedural safeguards.

Moreover, OMB and COWPS personnel acknowledge that OMB did not develop satisfactory procedures for assuring that agencies applied the IIS requirements and conducted cost-benefit analyses in good faith.[153] In addition, placing the IIS program under the exclusive jurisdiction of OMB removed key decisions concerning the identification of costs and benefits, discount rates, and valuation of intangible benefits from wider public control. For example, OMB established a ten percent discount rate for evaluating costs and benefits distributed over time, without congressional or public participation.[154]

During this period, COWPS asserted its authority to monitor and analyze inflationary impacts throughout the economy.[155] COWPS' reviews of proposed agency rulemaking under its own statutory authority[156] are filed with the agency during the public comment period and therefore are available to the public.[157] COWPS reviews also occur off the agency record when CEA and various individual aides to the President ask COWPS to provide staff and analyses on economic matters.[158] Given these opportunities, COWPS has actively participated in agency proceedings subject to IIS and subsequent Executive order require-

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work enforceable by private civil action." *Id.* at 234-36. *See also* National Renderers Ass'n v. EPA, 541 F.2d 1281 (8th Cir. 1976) (court refused to base private party's successful challenge of EPA new source standards on Executive Order 11821). By the same token, procedural or methodological deficiencies in cost-benefit analyses included in an agency IIS presumably could not be challenged in private lawsuits.

[152] *See* Brookhaven Report, *supra* note 17, at 171-92.

[153] Interviews with staff of OMB, COWPS, and agencies subject to OMB memoranda in Washington, D.C. (Fall 1978).

[154] Office of Management and Budget, U.S. Executive Office of the President, Circular No. A-94 *re* Discount rates to be used in evaluating time-distributed costs and benefits (Mar. 27, 1972).

[155] Council on Wage and Price Stability Act, Pub. L. No. 93-387, 88 Stat. 750 (1974) (codified at 12 U.S.C. § 1904 (1976 & Supp. I 1977)). Council authority was most recently extended to September 30, 1980, by Pub. L. No. 96-10, 93 Stat. 23 (codified at 12 U.S.C.A. § 1904 (West Pamphlet 2, 1979)).

[156] COWPS is authorized to review and intervene in agency and department proceedings. 12 U.S.C.A. § 1904 note (3)(a)(7), (8) (West Supp. 1979).

[157] Editor's telephone interview with Roy Nierenberg, COWPS Deputy General Counsel (Jan. 21, 1980).

[158] Interview with Roy Nierenberg, COWPS Deputy General Counsel and John Moralles, COWPS Senior Economist, in Washington, D.C. (Dec. 1978).

ments.[159]

While the Ford Executive orders were in effect, COWPS reviewed IIS's prepared by agencies, assessing them independently and commenting on their inflationary impact. COWPS also began intervening aggressively in agency proceedings "to present its views as to the inflationary impact that might result from the possible outcomes of such proceedings" although the Council has "no legislative authority to impose mandatory controls nor . . . to prevent or delay any federal agency action."[160]

In a typical case, COWPS appeared before the Consumer Product Safety Commission in 1977 and presented extensive testimony on CPSC's proposed power lawn mower safety standard. COWPS' testimony stated several bases for its objection to the proposed standards—primarily that they were based on insufficient information and that COWPS' estimates show costs exceeding benefits.[161] COWPS presented estimates that the first-year cost of the standard would be greater than $371 million, that sales would decrease, and that the dollar benefits of reducing the annual tolls of injury and death (56,000 injuries and twenty-five deaths in 1976) would probably fall below $163 million, thereby producing an unfavorable benefit to cost ratio.[162]

Earlier COWPS comments reveal its untested assumptions about social costs. For example, COWPS disputed estimates that the "cost of a day incapacitated" was forty dollars and that an average wage rate of $225 per week be used in calculating the costs of permanent disability.[163] It assumed that any pain and suffering costs, as proposed by others appearing before CPSC were overestimated,[164] and that the value of life amounts proposed were probably overestimated to the extent they exceeded the $240,000 amount estimated by the National Highway Traffic Safety Administration.[165]

CPSC responded by internally disputing, in part, COWPS' estimates and other aspects of its cost-benefit analysis methodology, and its primary reliance on cost-benefit in setting health and safety regulations under its enabling act.[166] In February 1979 CPSC published a final standard which is not effective until January 1982.[167] While influencing CPSC's balancing analysis and the ultimate standard, COWPS delayed the promulgation of the safety standard.

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[159] In a quarterly report, for example, COWPS revealed its selective involvement in OSHA proceedings on machine guards and benzene exposure, CPSC proceedings on power lawn mowers, and its filing of numerous reports on other health, safety, and environmental problems within the regulatory jurisdiction of EPA, OSHA, CPSC, FDA and other agencies. COUNCIL ON WAGE AND PRICE STABILITY, U.S. EXECUTIVE OFFICE OF THE PRESIDENT, QUARTERLY REPORT at iv (Oct. 1977).

[160] *Id.* at 9-12.

[161] Council on Wage and Price Stability, Comments before the Consumer Product Safety Commission on Power Lawn Mowers under 16 C.F.R. § 1205 (Aug. 12, 1977).

[162] *Id.* at 7-14.

[163] Council on Wage and Price Stability, Comments before the Consumer Product Safety Commission on Proposed Lawn Mower Safety Standard 9-10 (Oct. 14, 1975).

[164] *Id.* at 9-13.

[165] *Id.* at 12.

COWPS repeatedly has demonstrated this disturbing ability to influence safety standards and delay agency action by using economic studies laden with arbitrary assumptions about health and other matters that transcend economic expertise. The significant roles played by COWPS and OMB under the Ford Executive orders rested on no particular expertise about, nor demonstrated concern for, the social, environmental, and other noneconomic issues involved.

In 1976 COWPS and OMB solicited agency and public comments on the IIS program[168] and received a wide variety of guarded criticisms, particularly from the health, safety, and environmental regulators.[169] Executive Order 11949[170] subsequently extended the IIS program until the end of 1977.[171]

B. Carter Administration "Regulatory Analysis" Executive Order

1. Executive Order 12044

The Carter administration, faced with the need to control inflation and with increasing criticism of federal regulation, promulgated Executive Order 12044 on March 23, 1978.[172] The Order requires agencies to prepare a "regulatory analysis" for all regulations having an annual impact of at least $100 million on the economy or causing a "major" price increase for an industry, level of government, or geographic area.[173] Each analysis must state the problem addressed, describe the economic consequences of alternative solutions, and explain the selection of one alternative over the others.[174] The Order provides for public notice of preliminary analyses and periodic review of existing regulations. It directs OMB to ensure effective implementation.[175]

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[166] *See* Internal Memorandum of Consumer Product Safety Commission, *re* Power Lawn Mower Comments (Feb. 6, 1978).

[167] 44 Fed. Reg. 9990 (1979) (to be codified in 16 C.F.R. § 1205).

[168] 41 Fed. Reg. 32,463 (1976).

[169] For example, the Department of Commerce called for "specific guidelines" to assure "uniform applications, similar to environmental impact statement guidelines of the U.S. Council on Environmental Quality." EPA recommended phasing out the IIS program and felt that "there are definite limitations in the state of the art of benefits estimation in the environmental areas." HEW felt that "the analyses should be public as a matter of principle" and a staff analysis pointed out the "many pitfalls in application" of cost-benefit analysis. The Food and Drug Administration recommended discontinuance. The Department of Labor commented that the IIS program had not clearly encouraged "better planning and management within government." Letters on file with OMB in response to 41 Fed. Reg. 32,463 (1976). Nevertheless, COWPS' summary report indicates little agency opposition to the IIS program. *See* Council on Wage and Price Stability and Office of Management and Budget, An Evaluation of the Inflation Impact Statement Program (Dec. 7, 1976).

[170] 3 C.F.R. 161 (1977 Compilation).

[171] *Id.* at 162. The Carter administration indicated, however, that the evaluation of economic impact by regulatory agencies would be reconsidered. CEA then circulated drafts for new economic analyses. One of the most significant CEA departures from Ford administration practice was its proposed modification of the cost-benefit approach being used in all economic analyses. CEA indicated that it would stress selection of the least costly regulatory alternative—a cost-effectiveness approach—and that therefore CEA would address the methods of achieving regulatory goals without attempting to influence the establishment of the goals themselves. *See* [1977] 8 ENVIR. REP. (BNA) 581. For EPA's response to the CEA draft guidelines, see *id.* at 699. This proposed approach was not followed, however, after enactment of President Carter's Executive Order 12044.

The new Executive order affords OMB, CEA, and COWPS considerable discretion to shape agency use of regulatory analysis. OMB, CEA, and COWPS have used this freedom to reinstate the cost-benefit analysis practices of the earlier Ford Executive orders that the Carter administration ostensibly sought to avoid.[176] OMB has issued a memorandum to implement Executive Order 12044 by providing the agencies with "guidance on the contents of a regulatory analysis."[177] The guidance, developed with CEA and COWPS, requires agencies to compare the economic consequences of each alternative regulation and explain the reasons for choosing one alternative over the other.[178]

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[172] 3 C.F.R. 152 (1978 Compilation). The Order also calls on agencies to minimize paperwork, publish a semiannual agenda of proposed regulations and existing regulations under review, and improve public participation and the oversight role of agency administrators in regulatory proceedings. *Id.* at 153. In addition, agencies are to use new criteria in developing final regulations including the writing of regulations "in plain English," evaluation of alternatives to regulation, and estimation of reporting burdens created by the proposed regulations. *Id.* at 154.

[173] *Id.*

[174] *Id.*

[175] *Id.* at 155-56. As of September 1978, virtually all agencies subject to Executive Order 12044 had published their proposed implementing regulations in the Federal Register. Regulatory analyses were not required in pending rulemaking proceedings if an Economic Impact Statement had already been prepared in accordance with Executive Orders 11821 and 11949. *Id.* at 155.

[176] *See* J. Morall, Regulatory Reform in the Carter Administration 5 (paper presented at the Allied Social Science Associations Annual Meeting in New York, Dec. 28, 1977).

[177] Memorandum from Wayne G. Granquist, Associate Director for Management and Regulatory Policy, Office of Management and Budget, to the Heads of Departments and Agencies, entitled "Regulatory Analysis" (Nov. 21, 1978) [hereinafter cited as OMB Memorandum on Regulatory Analysis].

[178] *Id.* The memorandum provides, *inter alia*, that each agency analysis contain:

> (3) An analysis of the economic consequences—direct as well as indirect effects, and their significance—of each of these alternatives (including the no action alternative); such consequences should be presented in comparative form to sharpen the issues and provide a clear basis for choice among alternatives; these consequences include:
>
> (a) specific burdens imposed by each alternative
>   - (i) what types of burdens (and how much) are placed on specific groups as a result of compliance?
>   - capital outlays
>   - other costs of compliance including operating and maintenance costs

Executive Order 12044 and the OMB memorandum do not use the terms cost, benefit, or cost-benefit analysis. Instead, they use the terms burdens, gains, and overall economic impact. Nevertheless, their practical effect has been to authorize the continued use of cost-benefit analysis.[179]

2. *Regulatory Analyses Conducted by the Regulatory Analysis Review Group and the Council on Wage and Price Stability*

The newly established Regulatory Analysis Review Group (RARG) chaired by the CEA and staffed by COWPS,[180] conducts a limited number of special economic analyses in addition to those imposed on the agencies under Executive orders and statutes enforced by OMB, COWPS and CEA. President Carter stated that RARG's role is "to review agency regulatory analyses and to consult with the agencies on the conduct of such analyses," and "to conduct an interagency re-

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- administrative burden (reporting requirements, delays, uncertainty, etc.).

(ii) who bears those burdens?

- what burden falls on what types of enterprises, levels of government, major geographic regions, communities, and urban areas? (e.g., the impact on employment, fiscal condition, availability of public services, etc.)
- how are consumers and various population groups burdened? (e.g., income distribution, housing availability, etc.).

(b) specific gains produced
  (i) what types of specific gains (and how much) to society as a whole would each alternative produce?
  (ii) who would be helped, how, and by how much, by each alternative?

(c) overall economic impacts of each alternative
  (i) how would productivity and overall economic efficiency be affected?
  (ii) how would prices and employment be affected?
  (iii) how would the U.S. foreign trade position be affected (e.g., effect of increased costs for domestic companies on the price of goods that compete with imports, effect of increased costs for domestic companies on the price of U.S. exports, effect on the quality or utility of products and thus on the demand for U.S. exports, extent to which foreign competitors are subject to similar regulations, effect on competition between U.S. and foreign suppliers in third countries)?

(4) A detailed explanation of the reasons for choosing one alternative over the others; questions to be answered:
  (a) Will the selected alternative produce the intended results in the least burdensome manner possible? If not, why is this the preferred alternative?
  (b) Why isn't the action more stringent?—less stringent? What tradeoffs does the selected alternative reflect?

Id. at 3-4. For other OMB promulgations implementing Executive Order 12044, see 43 Fed. Reg. 21,997 (1978); 43 Fed. Reg. 24,219 (1978).

[179] *See* J. Morall, *supra* note 176.

[180] President Carter informally established RARG to consult with agencies and to review agency regulatory analyses prepared under Executive Order 12044. 43 Fed. Reg. 12,668 (1978).

view of 10-20 regulatory analyses each year."[181] CEA, however, directed RARG to use cost-benefit analyses that are substantially similar to the regulatory analysis requirements that OMB imposes on the agencies.[182] RARG's Executive Committee selects certain agency proposals for detailed analysis on the basis of several criteria, including potential economic impacts and total cost, the precedential value of RARG action, regulatory overlap or conflicts between agencies, and the inadequacy of the agency's own regulatory analysis.[183]

COWPS typically takes two to four weeks to produce a draft analysis for RARG.[184] When RARG reaches a consensus on the draft, Presidential aides may also review the report before the COWPS Director files the report for the agency record. RARG members may file dissenting opinions. Although RARG's deliberations are closed to the public, its reports are filed for the agency record, which is available to the public.

The ultimate reconciliation of an agency's regulatory analysis and the RARG report rests with the agency. But as a practical matter, RARG exerts considerable influence on the agency. This influence may result in part from new, convincing data, exposure of deficiencies in the agency's own analysis, or RARG's innovative regulatory approach.[185] The primary reason for RARG's influence, however, is that its reports issue directly from the Office of the President.[186]

COWPS lacks a uniform policy for dealing with many methodological limitations of cost-benefit analysis[187] that it encounters when preparing regulatory analyses for RARG or under its own independent statutory authority.[188] Each analyst selects a discount rate and estimates critical factors, such as the economic valuation of health and environmental benefits and the allocation of costs and benefits to different societal sectors, without any meaningful guidelines.[189] COWPS staff contend that this ad hoc approach results from the different styles of analysts and the differences between proposed regulations.[190] In addition, RARG analyses incorporate technical positions and studies done by the OSTP[191] even though these reports are much less thorough and sophisticated than the original agency study.[192] Despite the absence of a consistent approach to methodological problems, RARG reports filed in 1978[193] reveal its preferences for performance standards over design standards, incremental economic incentives over standards enforced by fixed penalties, and individual choice over government-dictated outcomes. These preferences, which occasionally lead to recommended innovative regulatory approaches, challenge the justifications for agency action.

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[181] *Id.*

[182] *Compare* Memorandum from Regulatory Analysis Group, Council of Economic Advisors, U.S. Office of the President, entitled "Regulatory Analysis" (undated, but issued summer, 1978) *with* OMB Memorandum on Regulatory Analysis, *supra* note 177.

Given the narrow economic course set for the agencies and RARG by OMB and CEA, pressures developed to create yet another regulatory oversight organization to deal more readily with the societal benefits of health, safety, and environmental programs and to be more favorably disposed to their implementation in the face of economic analyses. This led to Carter's creation of the Regulatory Council, following the suggestions of EPA officials. *See* Memorandum from President Carter to Executive Departments and Agencies, entitled "Strengthening Regulatory Management" (Oct. 31, 1978). For some preliminary indications as to the Council's agenda, see 5 EPA J. 29 (1979). The Council intends to establish a regulatory calendar providing an overview of all agency activities and to improve benefit calculations. The OMB staff, however, believes that trying to place a conclusive value on benefits will only lead to further controversy. Interviews with Peter Petkas, Executive Director of the Regulatory Council, and OMB and COWPS staff, in Washington, D.C. (Fall 1978).

[183] Interview with John Moralles, COWPS Senior Economist, in Washington, D.C. (Dec. 1978).

[184] Discussion of RARG procedure based on interviews with COWPS staff economists and attorneys in Washington, D.C. (Fall 1978).

[185] The RARG process has been characterized by OMB and COWPS staff as a reasonable approach to increased agency awareness of the excessive regulation problem. *Id.*

[186] *Id.*

[187] See text accompanying notes 27-65 *supra*.

An additional assumption consistently injected into COWPS' analyses is the necessity for maintaining the economic status quo. COWPS does not encourage either redistributing income or impairing the economic status of regulated firms to solve a health, safety, or environmental problem. COWPS believes that agencies share this assumption.[194]

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[188] Council on Wage and Price Stability Act, 12 U.S.C.A. § 1904 note (West Supp. 1979).

[189] Interview with COWPS staff in Washington, D.C. (Fall 1978).

[190] *Id.*

[191] Congress created OSTP by the Presidential Science and Technology Advisory Organization Act of 1976, Pub. L. No. 94-282, 90 Stat. 463 (codified at 42 U.S.C. 6611 (1976)), following the recommendations of President Ford. Executive Order 12039, 43 Fed. Reg. 8095 (1978), transferred various advisory functions to it. OSTP has become a consulting service organization providing technical support for the analyses and recommendations COWPS provides RARG. See Report of Dr. Frank Press, Director, OSTP, to the House Committee on Science and Technology (Oct. 31, 1978), which describes in some detail numerous OSTP functions, but nowhere describes its role of serving COWPS and RARG other than alluding to "numerous other areas where equal [OSTP] attention is given to contemporary issues, usually with action-oriented policy or management decisions in mind."

[192] See, for example, the RARG report for EPA's proposed revision of the national ambient air quality standards for photochemical oxidants (the ozone standard), 43 Fed. Reg. 26,962 (1978). The report criticizes EPA reliance on the consensus of expert panels, existing research and literature, and monitoring systems in establishing its proposed rule, but presents little evidence to support its own preferences.

[193] In 1978, RARG filed reports with agencies on four proposed agency actions: EPA's national ambient air quality standards for photochemical oxidants (filed Oct. 16, 1978); OSHA's rules on worker exposure to acrylonitrile (filed May 19, 1978); Department of Transportation's rules on nondiscrimination against the handicapped (filed Oct. 24, 1978); and OSHA's rules on toxic substances posing a potential occupational carcinogenic risk (filed Oct. 24, 1978).

COWPS usually files its own analysis of a proposed rule for the agency record during the public comment period.[195] Frequently, however, it conducts a second review of the final regulation after the close of the comment period and before publication.[196] The CEA and other Presidential aides initiate these additional COWPS reviews, which are then used off the record and in ways beyond COWPS' formal control.[197] COWPS analyses so used wield additional influence, regardless of any arbitrary assumptions and inadequate technical arguments they might contain. Because of such ex parte influence and record deficiencies, subsequent judicial review of the final agency action cannot ensure that the agency acted properly on the basis of available evidence.[198]

Several agencies and interest groups have expressed opposition to RARG activities. EPA, for example, disagreed strongly with the RARG report on EPA's proposed photochemical oxidants regulation.[199] EPA considered the approach illegal because it calls for a consideration of cost prohibited by the Clean Air Act, inadequate because it fails to provide for full review of all available medical evidence, and inaccurate because it overstates control cost estimates.[200] Despite the apparent weaknesses of the technical criticisms expressed by COWPS and OSTP, they strongly influenced the outcome; EPA's final standards were significantly less stringent and less protective of health than its proposed rules.[201] The final standards, however, presumably will "cost" less than the proposed standards.

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[194] Interview with John Moralles, COWPS Senior Economist, and Roy Nierenberg, COWPS Deputy General Counsel, in Washington, D.C., (Dec. 1978).

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] See the discussion of agency contacts with interested persons under Executive Order 12044, 43 Fed. Reg. 36,412 (1978):

> The agency should address the question of how it handles contacts with persons interested in a developing rule. Such frequent and informal contacts between agency decisionmaking personnel and interested outsiders at this stage of the process are unavoidable and usually desirable. Yet they may give rise to suspicions of improper influence, particularly where the pattern of contacts seems disproportionately to favor particular requirements, preparation of memoranda of significant contacts for inclusion in the rulemaking file, open meetings, and conscious efforts to balance contacts.

Id. at 36,417. See also, Putting Ex Parte Communications in the Record, *id.* at 36,419.

A Justice Department memorandum concludes that there is neither a constitutional nor a statutory bar to contacts between presidential aides and agency rulemakers if procedural safeguards of this type are observed. Memorandum from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel, to Cecil D. Andrus, Secretary of the Interior, entitled, "Consultation with Council of Economic Advisors Concerning Rulemaking under Surface Mining Control and Reclamation Act," (Jan. 17, 1979). *See also* Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 AD. L. REV. 377 (1978); Wright, *Rulemaking and Judicial Review*, *id.* at 461.

[199] See note 192 *supra*.

[200] Memorandum from Walter C. Barber, Director, Office of Air Quality Planning and Standards, to David G. Hawkins, Assistant Administrator for Air, Noise, and Radiation, *re* Council on Wage and Price Stability/Regulatory Analysis Review Group Critique of the Proposed Ozone Ambient Air Quality Standard (Nov. 8, 1978).

The Environmental Defense Fund (EDF) considers RARG a threat to "important commitments . . . to the health and welfare of the American people, with little or no effect on inflation or government efficiency."[202] EDF has sought (1) to confine RARG's activities to the public comment period; (2) to have RARG file a summary of its meetings with agency officials for the agency record; (3) to have RARG open all its meetings to the public; and (4) to prevent RARG from delaying the regulatory process, particularly prior to proposed rulemaking. EDF, RARG, and other Presidential advisors have discussed these issues, but no changes have resulted in RARG policy to date.[203]

The controversy continues in the media[204] and in Congress. In February 1979 Senator Muskie conducted hearings of the Senate Subcommittee on Environmental Pollution "to assess the merit, legality and political ramifications of the White House economists' roles in environmental regulations."[205] The chairmen of COWPS and CEA testified, along with representatives of various environmental organizations.[206]

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201. 44 Fed. Reg. 8202 (1979) (to be codified in 40 C.F.R. pt. 50). In its summary of the final rulemaking, EPA outlined the extent to which it changed its position:

> On June 22, 1978, EPA proposed changes in the standard (43 FR 26962) based on the findings of the revised criteria. The proposed changes included (1) raising the primary standard to 0.10 ppm, (2) retaining the 0.08 ppm secondary standard, (3) changing the chemical designation of the standard from photochemical oxidants to ozone, and (4) changing to a standard with a statistical rather than deterministic form. The final rulemaking will make three further changes in the standard: (1) Raising the primary standard to 0.12 ppm, (2) raising the secondary standard to 0.12 ppm, and (3) changing the definition of the point at which the standard is attained to "when the expected number of days per calender year with maximum hourly average concentrations above 0.12 ppm is equal to or less than one."

Id. EPA asserted that the changes, deemed harmful by many, were not the result of a trade-off between health and economic considerations or a RARG type of economic analysis. *Id.* at 8213.

202. *See* letter from Robert J. Rauch, Staff Attorney, Environmental Defense Fund, to Charles Schultze, Chairman, Council of Economic Advisors (July 19, 1978).

203. The Center for Law and Social Policy, the Natural Resources Defense Council, the Appalachian Coalition, the Council of the Southern Mountains, Inc., the Northern Plains Resources Council, Illinois South, and the Texas Committee on Natural Resources have filed a consolidated action challenging ex parte contacts between members of CEA and the Department of the Interior in connection with proposed permanent strip mining regulations. COWPS prepared a report on behalf of RARG concerning the proposals in early 1979, which CEA members allegedly passed on to the Department of the Interior after the public comment period had closed. *In re* Permanent Surface Mining Regulations Litigation, No. 79-1144 (D.D.C., filed June 6, 1979).

204. *See, e.g., Should Presidents Bend the Rules?*, N.Y. Times, Feb. 14, 1979, § A, at 24, col. 1.

205. [1979] 9 ENVIR. REP. (BNA) 1993.

206. *See Executive Branch Review of Environmental Regulations: Hearings Before the*

3. Regulatory Reform: Conflicts and Opportunities

Regulatory reform is in a state of flux, as COWPS, CEA, OMB, RARG, OSTP, the new Regulatory Council (RC),[207] agencies, and Congress[208] respond to Executive Order 12044. Controversy grows over the use of regulatory analyses, the adequacy of the methodologies employed, and the proper degree of Presidential involvement in agency decisionmaking. Regulatory reviews conducted under President Carter's Order provide new opportunities to influence agency actions on economic grounds under the aegis of the Office of the President, regardless of the merit of the analytical approaches used. Without uniform guidance on the critical methodological limitations of cost-benefit analysis, important public policy issues raised by these limitations are left to staff economists, consultants, and Presidential advisors.[209] Regulatory cost-benefit analysis has become a numbers game that eludes accountability.

Arguably, flexibility may be justified while agencies learn to analyze costs, benefits and alternative regulatory actions. OMB staff acknowledge the need for formalization, but not until they gain five or six years of experience with Executive Order 12044 and the regulatory cal-

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Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess. (1979).

[207] See note 182 *supra* on the creation of the Regulatory Council.

[208] Congress is now assessing the President's efforts and considering its own initiatives. Senators Ribicoff, Kennedy, and others introduced a bill "to provide for the regulatory analysis of proposed rules and the review of existing rules by the agencies." S. 262, 96th Cong., 1st Sess. § 602 (1979). The bill carefully provides that the agency draft and final regulatory analyses for proposed major rules include estimates of "projected economic, and projected health, safety and other noneconomic effects . . . which the agency is permitted by law to take into account." *Id.* § 603.

The bill, however, provides no intelligible principle for agency consideration of both quantifiable economic factors and unquantifiable noneconomic factors such as health, safety, and environmental effects. Nor does the bill provide any guidance for valuing unquantifiables, for using discount rates, or for detemining appropriate distributions of the effects across societal sectors. The bill, if enacted, may well dissuade agencies from undertaking purely economic analyses of the type fostered by Executive Order 12044. Conversely, however, it may provide the necessary authority for agencies to incorporate all these considerations into a cost-benefit analysis or regulatory analysis type of framework, with predictable problematic results.

Furthermore, the bill provides that "[a]ny regulatory analysis prepared . . . under . . . this title, including any procedure involved therein . . . shall not be subject to any judicial review in any court." *Id.* § 607. Without the accountability provided by judicial review, and without consistent and vigorous oversight by Congress of agency regulatory analyses, the agencies will have considerable discretion to use and abuse regulatory analysis.

It should be noted that in most respects relevant to this Article, S. 262 is substantially similar to S. 755, the "President's bill" filed in 1979 to promote legislative enactment to Executive Order 12044 requirements. As of publication date, the Senate has not acted on either bill.

[209] OMB and CEA guidelines are couched in general terms and are silent on key methodological problems. See text accompanying notes 176-79 *supra*.

endar.[210] They believe that formalization now would force agencies and Presidential offices to misallocate their resources by directing agency personnel to focus on trivial aspects of their decisions.[211] In addition, OMB staff fear that articulation of assumptions could lead to litigation, with decisions on controlling costs being made in the courts, similar to the NEPA experience.

This desire to maintain flexibility explains OMB's failure to promote its ten percent discount rate memorandum[212] or to promulgate standardized approaches to the valuation or distribution of effects issues. OMB thus preserves the executive branch staff's discretion for dealing with precisely those persistent methodological problems that transcend analyst expertise.

Finally, the roles of RARG, RC, COWPS, OMB, CEA, OSTP, special Presidential advisors, and the agencies themselves in the regulatory reform process are overlapping and unclear. Guidelines have been issued in an inconsistent and uncoordinated manner, while earlier memoranda, such as OMB's 1972 circular on the ten percent discount rate[213] are ignored, but remain unrevoked, creating confusion among regulated firms, interest groups, and the public. Cost-benefit analysis has been acclaimed as a panacea for many perceived ills of the regulatory decisionmaking process; however, a clear need exists to reform this reform program through coordination of review functions and generic treatment of persistent methodological problems.

V

AGENCY STRUCTURING OF DISCRETION IN COST-BENEFIT ANALYSIS

Congress, CEQ, COWPS, RARG and OMB all have failed to address fully the significant methodological limitations and high potential for abuse of cost-benefit analysis. One solution, in the absence of meaningful legislative oversight or guidance to agency decisionmakers, is agency self-regulation.

Courts expect agencies to structure their decisionmaking discretion through rulemaking, thereby promoting agency reliability, predictability, and accountability.[214] Professor Davis is the leading proponent of this view: "When agencies have inadequately provided guides for their exercise of discretion, courts . . . should require clarification through rules or standards. The combination of such clarification with required statement of findings and reasons in individual cases is one of the most important arrangements for protecting against arbitrary exercise of discretionary power."[215] Davis believes that administrators "are clearly in the best position" to confine administrative power

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[210] Interview with OMB staff in Washington, D.C. (Dec. 1978).

[211] *Id.*

[212] Office of Management and Budget, U.S. Executive Office of the President, Circular No. A-94 *re* Discount Rates to be Applied in Evaluating Time-Distributed Costs and Benefits (Mar. 27, 1972).

[213] *Id.*

[214] K. DAVIS, ADMINISTRATIVE LAW TEXT 143, 148 (1972).

> because they have the most direct knowledge of practical needs with respect to [that] power.
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> . . . .
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> . . . The improvement in the quality of justice may stem from three interlocked items—the guides for discretion, the control of discretion through the requirement that findings and reasons . . . be related to the guides, and the increased effectiveness of the judicial check.[216]

Explaining the procedures and assumptions of agency decisionmaking will improve agency accountability and foster an adequate record for judicial review, particularly review of informal rulemaking. Judge Wright has stated:

> [I]f courts are going to make a searching and careful review of the facts in an informal rulemaking proceeding, they will need a proper record. How will a court determine whether the agency's action is arbitrary or capricious or supported by substantial evidence without a record? In spite of continuing exhortations and admonitions from many courts, including our own, today's informal rulemaking proceedings often do not provide a proper record.
>
> Some government agencies and departments seem to be operating under the old assumption that agency expertise is a proper blanket with which to insulate themselves from searching judicial review. But the insulation is occuring at a time when lower courts are being required by the Supreme Court to pierce the blanket and get to the facts *and* the underlying policy considerations—not to weigh them but to consider them to determine whether the agency action under review is rational.[217]

This review of legal, methodological, and institutional issues associated with the extended use of cost-benefit analysis suggests several criteria to measure agency self-regulation of discretion: (1) statutory authority should clearly guide agency choice of analytical methods; (2) an agency should develop appropriate methods for dealing with methodological limitations; (3) an agency should promulgate generic rules to limit ad hoc arbitrary assumptions; and (4) an agency should conduct its cost-benefit analysis in good faith, as indicated by the timing and weight it accords cost-benefit analysis in its decisions. These criteria are considered below in the context of two agencies that use cost-benefit analysis in decidedly different ways, NRC and EPA.

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[215] *Id.* at 156. Agency articulation on a case-by-case basis of how discretion is used also can improve agency accountability. COWPS itself, in its major study of the inflationary impact statement program, called for agency explicitness on a case-by-case basis:

> The cost-benefit analyses of the proposed regulations that have been performed on OSHA regulations have been done by other Federal agencies such as CWPS and EPA. If [the Department of Labor's] IIS's were structured so as to reveal explicitly the costs and benefits of alternative proposals it would be stronger evidence than is presently available that OSHA views its IIS analysis as a management tool for improving regulatory decision-making rather than as a hurdle to overcome in promulgating regulations.

U.S. Council on Wage and Price Stability and U.S. Office of Management and Budget, An Evaluation of the Inflation Impact Statement Program 68 (Dec. 7, 1976). Furthermore, the OMB guidelines also call for agency articulation on a case-by-case basis in rulemaking. OMB Memorandum on Regulatory Analysis, *supra* note 177.

[216] K. Davis, *supra* note 214, at 144, 148.

[217] Wright, *supra* note 198, at 464.

A. Statutory Authority and Guidance for Use of Cost-Benefit Analysis

Federal agencies draw support for using cost-benefit analysis in their decisionmaking process from a variety of sources: NEPA, Executive orders, enabling statutes, and agency discretion. At present, agencies do not consistently identify the source of authority for using cost-benefit analysis although important legal issues, such as the degree of public participation required, often depend upon the particular authority relied upon.[218] Judicial review of cost-benefit analysis decisions also depends upon the legal authority that determined the agency's analytical method. For example, an NRC cost-benefit analysis in a reactor licensing proceeding carried out under NEPA must meet the Act's detailed statement requirement,[219] including additional requirements developed by the judiciary in construing NEPA.[220] On the other hand, an NRC cost-benefit analysis carried out under other authority, such as the Atomic Energy Act, must provide reasonable assurance that public health will be protected.[221] Furthermore, if agencies stated the implications of using various cost-benefit analysis authority and identified the authority actually relied upon, the agency's legal basis for adopting a particular methodological approach would be open to congressional, judicial, and public scrutiny.

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[218] For example, an agency performing cost-benefit analysis pursuant to NEPA is required to provide for public notice and comment, and may permit public hearings, in the preparation of environmental impact statements. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976). *See also* City of Romulus v. County of Wayne, 392 F. Supp. 578, 585 (E.D. Mich. 1975). On the other hand, it may be difficult to secure a similar degree of public participation in cost-benefit analysis conducted pursuant to Executive Order 12044, particularly since the Order has been construed not to provide a private cause of action permitting citizens and regulated interests to intervene in the "Regulatory Analysis" process. See note 151 *supra*.

[219] NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976). See text accompanying notes 69-71 *supra*.

[220] Calvert Cliffs' Coordinating Comm'n v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). See text accompanying notes 72-75 *supra*.

[221] See Citizens for Safe Power v. NRC, 524 F.2d 1291 (D.C. Cir. 1975), for possible distinctions between NEPA and Atomic Energy Act cost-benefit analyses. See also York Comm. for a Safe Environment v. NRC, 527 F.2d 812 (D.C. Cir. 1975).

B. *Acknowledgement of Cost-Benefit Analysis Limitations*

Agencies frequently fail to discuss important methodological issues of cost-benefit analysis in their published decisionmaking record either because the full background of their cost-benefit analyses is not part of the record, or because key assumptions are made without public comment or congressional oversight hearings.[222] After *Crowther v. Seaborg*,[223] NRC developed its cost-benefit analysis approach more fully than any other regulatory body. For example, the valuation of human life set by NRC for use in its cost-benefit analyses to establish reactor radiation emission controls requirements is $1000 per whole-body rem and $1000 per thyroid rem.[224] Originally, this monetization of human life was set forth as an interim standard with the promise of subsequent hearings. Nevertheless, NRC recently announced its decision "not to conduct a hearing to refine or reduce the health cost figures previously adopted."[225] The use of an "interim" valuation for a highly critical variable, without public hearing, is inconsistent with the politically responsive criteria for setting agency standards required by *Crowther v. Seaborg*.[226]

Under current licensing regulations[227] NRC requires an applicant for a reactor permit to demonstrate (1) that the plant is cost-effective in light of governing economic, social, and environmental factors, and (2) that overall benefits outweigh aggregated costs.[228] This review of alternatives seldom involves only commensurable factors. Especially problematic is the evaluation of alternative sites since it is unclear how NRC should value and compare unquantifiable environmental assets such as wetlands and unique ecosystems that differ from site to site.

Evaluation is further complicated because changes in population density around a plant during its operational life may affect its "cost" in terms of radiation exposure and attendant health effects. NRC's discretion in considering population growth when approving a plant site has been confirmed by the Supreme Court, provided the agency develops a "reasonable, consistently applied administrative interpretation" on this issue.[229] Nevertheless, NRC lacks standards for incorporating distributional considerations into cost-benefit based licensing determinations despite radiation's greater impact on persons living near the plant or those particularly susceptible to radiation, such as children and pregnant women.

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[222] Most agencies subject to Executive Order 12044 published proposed regulations for conducting "Regulatory Analyses." See note 172 *supra*. Review of the proposed regulations reveals that often the agencies did little more than restate the general requirements of the Order itself. *See, e.g.*, the proposed regulations of CPSC, 43 Fed. Reg. 32,392 (1978) and the Department of Energy, 43 Fed. Reg. 18,634 (1978). *But see* EPA's proposed regulations, 43 Fed. Reg. 29,891 (1978).

[223] 312 F. Supp. 1205 (D. Colo. 1970). See text accompanying notes 122-25 *supra*.

[224] 10 C.F.R. pt. 50 app. I (1979).

[225] 43 Fed. Reg. 22,253 (1978).

[226] 312 F. Supp. 1205 (D. Colo. 1970). See text accompanying notes 122-25 *supra*. Other features of NRC's cost-benefit analyses may be called into question as well. For example, Appendix I of the regulation, 10 C.F.R. pt. 50 app. I (1979), provides no guidance on evaluating human mutagenic effects and other impacts on the lives of future generations and their environments.

[227] 10 C.F.R. pt. 51 (1979). An applicant's environmental report must include a cost-benefit analysis which quantifies factors "to the fullest extent practicable." *Id.* § 51.20(b). The NRC draft environmental impact statement likewise must contain a preliminary cost-benefit analysis. *See id.* § 51.23(c).

[228] Interview with NRC staff in Washington, D.C. (Fall 1978).

In addition, NRC use of cost-benefit analysis is inconsistent. Plant safety features, such as the emergency core cooling system, are not subject to cost-benefit analysis in the rulemaking and plant permit review processes because NRC believes costs cannot be considered when safety is an issue.[230] There is no rational distinction, however, between safety features designed to prevent accidents and operational features intended to minimize the leakage of radioactive effluents. Since both "safety" and "operational" constraints reduce the possibility of radiation damage to humans and the environment, it is unclear why the latter should be regularly subject to cost-benefit based rulemaking, while the former are not. Perhaps this dichotomy reflects a reluctance to consider high-cost, low probability events; structural failures and resulting large-scale catastrophes could tilt the cost-benefit analysis against the intended agency action.[231]

By comparison, EPA engages in cost-benefit analysis to some extent under several statutes and programs involving air, water, radiation, pesticides, and toxic chemicals, but without the methodological coherence or thoroughness of NRC.[232] For example, EPA analysis leading to its environmental radiation standards for the uranium fuel cycle[233] involved two critical findings, one technical, the other decidedly nontechnical. First, EPA analysts compared the costs of radiation control to the number of adverse health effects avoided at each level of control. They found that beyond the point where potential adverse health effects would be reduced at the rate of one life per $500,000, further life saving benefits would require large additional expenditures.[234] Second, EPA justified selecting a standard based on this breakpoint in the cost-benefit curve because it felt the acceptable cost of saving an unspecified human life should not exceed $500,000.[235]

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[229] Northern Ind. Pub. Serv. Co. v. Porter County Chapter of Isaak Walton League of America, Inc., 423 U.S. 12, 14 (1975).

[230] Interview with Robert Minogue, NRC Standards Division, in Washington, D.C. (Aug. 1977).

[231] Regulation of licensee activities is subject to NRC's "Value Impact Guidelines." This approach calls for sequential consideration of four questions: (1) the problem to be addressed by new regulation; (2) upper level constraints already established or to be established by NRC or other agencies; (3) alternative methods of reaching such objectives; and (4) the value and impact of each alternative. These guidelines recommend no particular analytical technique for the fourth step, but permit the use of cost-benefit analysis or, where goals are already established, cost-effectiveness analysis, as a method of choosing among alternative regulatory constraints. *See* Office of Standards Development, U.S. Nuclear Regulatory Comm'n, Memorandum entitled "SD Staff Guidance for Preparation of Value/Impact Statements" (Apr. 11, 1977).

Although the guidelines supply a valuable framework for structuring NRC decisions, they do not address the quantification issue, the discount rate, or other particular problems of using cost-benefit analysis in setting standards. Moreover, their precise scope and applicability are difficult to determine because it is unclear how to draw the line between reactor licensee activities that relate to safety and those that do not.

[232] *See* discussion of NRC and EPA in Brookhaven Report, *supra* note 17, at 30-134.

Cynics might claim that EPA based its standard on NRC determinations of what controls the nuclear power industry could afford. In other words, EPA set a generous environmental standard to accommodate the maximum releases tolerable under NRC's site-specific reactor emission standards and to accommodate the potential number of reactors planned at any single site.[236] Improving the quality of an agency's cost-benefit analyses cannot directly control the impact of this prodevelopmental bias. More responsible cost-benefit analyses, however, would allow the public to see that such factors do affect agency decisionmaking.

The question remains whether a federal administrative agency alone should make these decisions about critical methodological problems. Although analysis carried out under NEPA is open to public scrutiny, the potentially controversial valuation of human life justifying the ambient radiation standard did not attract public or congressional comment, perhaps because the EIS did not clearly distinguish EPA's objective measurement of risk from its subjective determination of a socially acceptable risk based on life-saving cost estimates. Yet an agency's obligation to articulate its assumptions should be greatest when its cost-benefit analysis includes such politically sensitive elements as a monetary value for human life.[237]

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[233] OFFICE OF RADIATION PROGRAMS, U.S. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL RADIATION PROTECTION REQUIREMENTS FOR NORMAL OPERATIONS OF ACTIVITIES IN THE URANIUM FUEL CYCLE, FINAL ENVIRONMENTAL IMPACT STATEMENT (Nov. 1, 1976) (EPA Rep. No. 520/4-76-016).

[234] *Id.* at 48.

[235] *Id.* at 51; interview with Dr. William Rowe, Director of the Office of Radiation Programs, EPA, in Washington, D.C. (Fall 1978).

[236] NRC believes up to five reactors can be sited together, provided each operates efficiently—limiting its offsite emissions to five millirems per reactor, or a 25 millirems total for the cluster of reactors. Interviews with NRC staff in Washington, D.C. (Fall 1978). The EPA ambient standard established in its separate regulatory proceeding is also 25 millirems, either a remarkable coincidence or a planned harmonization of results.

[237] For several EPA proposals addressing these problems, see 43 Fed. Reg. 47,001 (1978). The planned initiatives include publication of regulatory analyses, promotion of citizen participation, and reimbursement for public participation.

C. *Development of Public Access "Regulatory Analysis" Under Executive Order*

It is uncertain whether cost-benefit analyses and related documents prepared in response to Executive orders are subject to timely public disclosure under the Freedom of Information Act (FOIA).[238] The courts could conclude that OMB, COWPS, or RARG is an "agency" and therefore subject to the Act under the *Soucie v. David* test.[239] In that case, the District of Columbia Circuit held that the President's Office of Science and Technology was an "agency," and not merely part of the President's staff, because it independently evaluated the scientific research programs of several federal agencies and published notices in the Federal Register.[240]

Even if OMB, for example, is an agency within the meaning of the Administrative Procedure Act, and hence FOIA, specific FOIA exemptions may prevent public disclosure of "Regulatory Analysis" documents. One exemption prevents disclosure of "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."[241] This exemption protects internal communication reflecting deliberative or policymaking processes, but not purely factual material. Agency cost-benefit analyses, background documents, and related OMB, COWPS, and RARG evaluations may fall within this exemption.[242]

Congress and the public may find other means of gaining access to Regulatory Analysis materials. Administrative Procedure Act provisions restricting an agency's right to take "official notice" of matters outside the decisionmaking record[243] and prohibiting ex parte communication during formal rulemaking and adjudicatory proceedings[244] may force disclosure of some documents. Furthermore, new legislation could require greater openness in presidential management of federal regulation through the Regulatory Analysis device.[245] An example of this kind of congressional intervention is the Congressional Budget and

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[238] 5 U.S.C. § 552 (1976).

[239] 448 F.2d 1067 (D.C. Cir. 1971).

[240] *Id.* at 1075. These are among the major distinguishing characteristics of OSTP considered by the court. During consideration of the executive reorganization plan creating OSTP, its status was specifically likened to that of the Budget Bureau, the predecessor of OMB. *Id.* at 1074.

[241] 5 U.S.C. § 552(b)(5) (1976).

[242] The Sunshine Act, 5 U.S.C.A. § 552b (West 1977), presents similar issues concerning publicly held deliberative meetings, availability of transcripts, and judicial review. *See* Administrative Conference of the United States, An Interpretive Guide to the Government in the Sunshine Act (1978). RARG meetings are closed to the public.

[243] 5 U.S.C. § 556(e) (1976).

[244] *Id.* § 557(d)(1)(C) (1976). See note 203 *supra*.

[245] *See* S. 262, 96th Cong., 1st Sess. (1979), which provides for agency publication of and public comment on initial regulatory analyses, as well as publication of final regulatory

Impoundment Control Act of 1974,[246] which restricted the President's right to impound funds and thereby curtail the scope of programs authorized by Congress. Similarly, Congress might not tolerate the modification of legislatively mandated regulatory programs through RARG's or OMB's imposition of additional nonstatutory criteria relating to inflationary impact and other "costs" of regulation.[247]

Finally, Executive Order 12044 requires agencies to publish proposed regulations for implementing the Order in the Federal Register and to give the public an early and meaningful opportunity to participate in the development of subsequent agency regulations.[248] The Order, however, permits each agency flexibility in choosing the most effective method for increasing public participation.[249] To transform these vague directives into meaningful public participation, OMB and RARG should review agency practice and formulate more detailed guidelines. In addition, agencies should take independent steps to open their activities to timely public review under Executive Order 12044.[250]

D. *Timing of Cost-Benefit Analysis in Decisionmaking*

Agencies frequently conduct cost-benefit analysis after making regulatory decisions on other grounds. Agencies can take administrative action subject to NEPA only after publishing the final EIS, which may include cost-benefit analysis, and allowing a suitable time period for public comment. Cost-benefit analysis under enabling statutes or other authority, however, generally is not subject to similar timing provisions. Analysts at several agencies believe that their agencies often

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analyses. Regulatory analysis itself, however, is excluded from judicial review. See note 208 *supra*.

[246] Pub. L. No. 93-344, 88 Stat. 332 (codified at 31 U.S.C. §§ 1400-1407 (1976)).

[247] See text accompanying notes 177-83 *supra*.

[248] 3 C.F.R. 153 (1978 Compilation). The order requires publishing an advance notice of proposed rulemaking, holding open conferences or public meetings, and providing the public at least 60 days to comment on proposed significant regulations. *Id.* In giving notice of proposed rules, each agency is directed to inform the public on how to obtain any draft regulatory analyses that may have been developed. *Id.* at 155.

[249] *Id.* at 153.

[250] Under Executive Order 12044, agencies now publish proposed and final regulations and issue regulatory reform agendas providing general assurances as to the timely availability of regulatory analyses and public participation. *See, e.g.*, 43 Fed. Reg. 47,005 (1978). Furthermore, published guidelines from OMB to the agencies and from CEA to RARG, require filing regulatory analyses for public availability and prior notice of public availability of draft regulatory analyses when the proposed rule is published in the Federal Register.

These general assurances, however, are ineffective in practice. For example, CPSC's final standard for power lawn mowers, 44 Fed. Reg. 9990 (1979), mentions the balancing that CPSC conducted between the need to reduce risks and possible adverse economic effects, but refers the reader to a Battelle Institute analysis of the economic costs, not included in the Federal Register entry. The Battelle report is an ad hoc analysis. Such references to ad hoc economic analyses, without provision of generic guidelines and justifications for the arbitrary elements of such analyses, do not adequately inform interested parties.

use cost-benefit analysis to "document" decisions already reached.[251] Such post hoc uses of cost-benefit analysis raise questions about the good faith objectivity of agencies in reaching regulatory decisions.

The timing of cost-benefit analysis often determines whether the technique is confined to its proper role in the decisionmaking process. In dealing with a regulatory problem involving technical uncertainty, risks, and control options based on scanty information, agencies normally undertake three tasks: (1) measurement of the risk; (2) identification of control options; and (3) determination of the level of risk acceptable to affected interests. The first and second tasks are primarily objective determinations that should not be "contaminated" by the technical expert's assumptions about the proper level of costs to impose on a regulated industry or the proper distribution of costs across different sectors of society. The third task, on the other hand, involves consideration of legal, economic, and social factors tradeoffs. Subjective valuation of costs and benefits through cost-benefit analysis may be appropriate here because the third task is carried out in the "sunshine," as required by administrative law. Agencies frequently fail to keep these functions distinct, polluting technical objectivity with unarticulated cost and other nontechnical factors. New regulatory procedures could prevent confusion of these functions by prohibiting the use of cost-benefit analyses until after technical measurement of risks and identification of control options have taken place.[252]

VI

CONCLUSION

Three broad conclusions can be drawn from this study. First, cost-benefit analysis is an inappropriate tool for regulatory decisionmaking on health, safety, and environmental problems. It should be replaced by the judicious use of cost-effectiveness analysis. Second, if cost-benefit analysis is to be used, and indeed increasingly used because of Executive pressures, several constitutional and public policy issues should be aired in order to ensure that the public and Congress approve of the transformation of regulatory decisionmaking from judgmental and qualitative balancing to economic and monetized balancing. Third, if neither the first nor second conclusion and the concerns they reflect are likely to be acted upon, society will have to "make do" with a set of incremental reforms in congressional, executive, and agency procedures.

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[251] Conclusion based on interviews with NRC, EPA, ERDA, and FEA staffs in Washington, D.C. (Fall 1978), in preparation of the Brookhaven Report, note 17 *supra*.

[252] Timing alone does not determine the weight of cost-benefit analysis in the decisionmaking process. When several different regulatory alternatives have favorable benefit-to-cost ratios, the agency must decide whether to follow the most favorable course of action. For example, NRC may select any site with a favorable cost-benefit ratio as long as no "obviously superior site" exists. *In re* Public Serv. Co., 5 NRC 503, 527-30 (1979). As a practical matter, NRC's use of cost-benefit analysis enables it to affirm the licensee's proposed site in virtually every case.

A. Cost-Benefit Analysis v. Cost-Effectiveness Analysis

Cost-benefit analysis is an unacceptable basis for governmental decisionmaking on persistent health, safety, and environmental problems. It is a simplistic tool that reduces concern for the individual to a monetized balancing. Worse, it has become a self-serving numbers game obscuring arbitrary and subjective values and assumptions, while impeding real progress toward our espoused health, safety, and environmental objectives.

Solutions to societal problems, such as nuclear reactor safety and human exposure to chemical carcinogens, require consideration of humanistic and environmental principles. Consideration of these principles is incompatible with a regulatory decisionmaking process in which economic factors play a dominant role.

At present, the Clean Air and Clean Water Acts promote health and welfare considerations over industrial costs in setting standards and requiring regulatory decisions to be based on the "best available technology." By acknowledging that these principles are primary in most health, safety, and environmental areas, regulatory agencies could (1) establish health and safety goals on the basis of objective estimates and acceptable levels of risk arrived at in open proceedings; (2) identify the best available methods for achieving these goals; and (3) choose among alternative methods of achieving these objectives through cost-effectiveness analysis, the traditional analytical method of finding the least costly path to a goal.

This approach confines economic concerns to their proper role as one of several criteria for choosing a method for solving a societal problem. Cost-effectiveness analysis helps to determine the means, in contrast to cost-benefit analysis, which uses a quantitative approach to determine both the ends and means. Most significantly, the executive branch and agencies can adopt the cost-effectiveness alternative under most existing statutory schemes.

B. Constitutional and Ethical Issues

The use of cost-benefit analysis in the regulatory decisionmaking process also presents issues that transcend administrative law and procedure. For example, maintenance of the proper separation of powers in light of the ambitious regulatory reforms proposed by the Office of the President raises a significant constitutional issue. If the balancing function, now delegated to the agencies, is conducted by the Office of the President, off the record and insulated from judicial review, power shifts from Congress to the Executive. This and other constitutional isues, which are beyond the scope of this Article, require vigorous discussion.

The use of cost-benefit analysis also raises important questions of professional ethics and responsibility for the economists and other analysts involved. It is irresponsible for such analysts to make arbitrary assumptions on issues which lie beyond their or anyone else's expertise. Decisions on the valuation of human life or environmental quality, the discount rate, and distribution of costs and benefits across society, are not properly dealt with by unaccountable analysts, but should be made by those vested with the responsibility to make these subjective choices. Congress and other publicly accountable officials must make these critical choices if cost-benefit analysis is to be employed responsibly.

The use of cost-benefit analysis also raises larger ethical questions. Our constitutional framework for governmental decisionmaking involves balancing many factors. It does not mandate the use of an economic framework, and indeed establishes a framework for decisionmaking which ensures that no single factor such as economics will dominate. The varied and often conflicting needs and desires of many segments of our society must be weighed against fundamental individual rights in order to establish ultimate societal values and reach an optimal governmental choice. This process is subverted when cost-benefit analysis is the basis of decisionmaking. An economic framework for making societal choices stresses only factors that are monetizable over a short period of time. Therefore, the use of cost-benefit analysis to determine our policies on such issues as radioactive waste disposal or access for the handicapped to public transportation systems inevitably leads to different results than those obtained by an analysis emphasizing long-term needs or individual welfare.

Public recognition of the ethical implications of governmental adoption of an economic framework for decisionmaking has been woefully insufficient. Responsibility for articulating public values lies with Congress. In light of the critical long-term consequences of cost-benefit analysis decisionmaking, meaningful and decisive congressional action is a necessity.

C. Reforming Present Cost-Benefit Analysis Practices to Promote Accountability

Rejection of cost-benefit analysis as a primary basis for regulatory decisionmaking and recognition of its functional, constitutional, and ethical limitations must occur eventually. Our political institutions, however, may not be ready to take these steps. Until meaningful change in the structural framework for decisionmaking occurs, some pragmatic, if limited steps can now be taken to promote greater accountability and reduce critical problems presented by agency uses of cost-benefit analysis.

When properly applied, cost-benefit analysis can be a useful tool in the regulatory decisionmaking process. When used objectively, in good faith, and with requisite analytical rigor, cost-benefit analysis provides a framework for the rational organization of multiple considerations. Determinations made from properly organized opinions and information can represent a logical process, which in turn promotes agency credibility and acceptance of agency decisions. Furthermore, cost-benefit analysis promotes the use of a consistent and predictable analytical structure for organizing data and opinions on the numerous issues involved in a proposed regulatory action. Clear articulation of each element of the decisionmaking process enhances fairness and increases agency accountability. Cost-benefit analysis also offers decisionmakers a simple method for reaching decisions in the multiobjective, pluralistic value context in which most agencies operate. Despite its potential values, however, actual cost-benefit analysis practices demonstrate significant methodological, substantive, and institutional limitations. Methodological problems, including valuation of attributes, choice of discount rates, and distribution of effects, have always beset cost-benefit analysis. The substantive issues stem, in part, from the methodological limitations. Monetization of environmental and health amenities constitutes an inappropriate treatment of factors that transcend economics. Moreover, cost-benefit analysis often is insensitive to specific distributional implications of alternative decisions, thereby conflicting with constitutional concepts of equal protection. Critical elements of cost-benefit decisionmaking, such as the selection of data on measurements of risks and benefits, the development and application of discount rates, and the choice of analytical methods to read the data, are subjectively based determinations. The source of the data is often the clearly self-interested company or technocrat. These subjective determinations must be publicly tested and openly verified before their adoption in cost-benefit analysis.

Agency use of cost-benefit analysis also raises a number of major institutional issues. Agencies such as NRC and EPA have failed to coordinate analytical approaches to shared problems, such as radiation, and to adopt common values for health effects and environmental attributes. Nor have EIS and regulatory analyses been coordinated. CEQ has been silent on how agencies should conduct NEPA balancing analyses while COWPS and OMB have played increasingly significant but undefined roles in regulatory decisionmaking. Practical difficulties make meaningful public participation and timely access to information and deliberative meetings a problem. Furthermore, the timing of a cost-benefit analysis often determines its actual influence on decisionmaking: if done late in the game, it may do no more than provide a post hoc rationale for a decision reached on other grounds.

Appropriate use of cost-benefit analysis in decisionmaking lies at the heart of new regulatory programs for protecting health, safety, and environmental quality. This is because each agency usually must reconcile multiple, frequently conflicting, statutory objectives and must follow specific statutory and Presidential requirements to conduct economic analyses. The increasing use of cost-benefit analysis reflects the administrative response to this growing need for a balancing or tradeoff process as the analytical foundation for agency decisions.

Given the conflicting demands of the escalating public outcry to render administrative agencies more accountable, statutorily or presidentially mandated balancing analyses, and the inherent problems presented by cost-benefit analysis, Congress, the Executive, and the agencies each must take steps to promote more responsible use of cost-benefit analysis in regulatory decisionmaking. The intent of the reforms discussed below is neither to foster nor exclude the use of cost-benefit analysis and other balancing analyses, nor to provide guidance as to when cost-benefit analysis should be used. Their purpose is to ensure that (1) cost-benefit analysis be responsibly employed whenever it is used, and that (2) the proposed reforms are implemented whenever regulatory agency balancing analyses are mandated.

1. Strategies for Congressional Reforms

Congress should conduct a comprehensive review of agency implementation of major health, safety, and environmental legislation to determine the extent to which agency uses of cost-benefit analysis or other balancing techniques are consistent with statutory objectives and sound administrative practice. The review should also identify conflicts bewteen Executive Order 12044 as implemented and statutory requirements that prevent the agencies from acting consistently with congressional objectives.

Congress should also conduct a special review of agency implementation of NEPA's requirements for "balancing analysis" and other methodological requirements of section 102(2). Congress should then provide clearer guidance to the agencies by amending NEPA to achieve the following:

- —Clarification of NEPA's applicability to agency rulemaking;
- —Coordination of NEPA implementation procedures with the procedural requirements of Executive Order 12044;
- —Clarification of the extent to which NEPA's impact assessment mandate requires quantification of the elements of a subsequent balancing analysis, the methodology for such quantification, and the

discount rate to be used for estimating the future impacts of agency action subject to NEPA; and

— Clarification as to whether agencies are required by NEPA to choose the best alternative resulting from the balancing analysis.

Congress, in future health, safety, and environmental legislation, should articulate more precisely the factors that federal agencies should consider in reaching decisions and furnish the "intelligible principles" necessary for agencies to meet the multiple objectives required by such legislation. Congress should state expressly when an agency should and should not use a cost-benefit approach and provide guidance as to how it is to be meaningfully integrated with Executive Order 12044 requirements. If Congress decides to promote a cost-benefit or other balancing analysis approach to regulatory decisionmaking, it should oversee the critical methodological issues such as valuation of intangible costs and benefits, use of discount rates, and distribution of effects.

Whether Congress provides guidelines on each of these issues or delegates that authority with guidance to an appropriate interagency body for resolution, the essentially nontechnical, subjective nature of these methodological issues must be recognized.

2. *Strategies for Reforms in the Office of the President*

The Office of the President should issue an Executive order amending Executive Order 12044 to provide further guidance to RARG, COWPS, OMB, and CEA in order to ensure that they implement Executive Order 12044 consistently with legislative requirements on health, safety, and environmental quality. The amended Order should enlarge the membership of RARG to include agency and nongovernmental personnel representing the legally protected health, safety, and environmental interests at stake in the Regulatory Analysis process. The new Order should require RARG and the other Presidential offices to function in open proceedings, provide full public access to the information they use, and, in conjunction with the agencies under review, follow all requirements of the Administrative Procedure Act. Furthermore, the Order should provide that all RARG proceedings and materials germane to any agency's final regulatory action be incorporated in the agency record of decision, available for public, congressional and judicial review.

Finally, the Order should direct RARG to make public findings on several key considerations in its review of any proposed agency action under Executive Order 12044:

—Authority for agency use of cost-benefit analysis or other balancing analyses;

—Particular methods of analysis selected by RARG or the agency, and attributes of such methods that conflict with governing legislation;

—RARG and agency methods for considering unquantifiable elements of the analyses, discounting future costs and benefits, evaluating distributional considerations, and other methodological problems;
—Timing of cost-benefit or other analysis vis-a-vis actual agency decisionmaking;
—Weight accorded to cost-benefit or other analysis in actual agency decisionmaking;
—Due process and Administrative Procedure Act safeguards developed by agencies in cost-benefit or other balancing analysis proceedings, including articulation of procedures through regulations, public notices, opportunities for affected interests to contest agency and RARG analyses before agency action, and restrictions on ex parte communications; and
—Public participation in agency cost-benefit analysis or other analyses and opportunity for review.

3. *Strategies for Reforms in All Regulatory Agencies*

Each regulatory agency using cost-benefit or other balancing analyses in making decisions should promulgate a generic regulation describing its use of these analytical tools in order to promote clear and consistent regulatory policy furthering the legislative and executive requirements under which the agency operates. The regulation should address the sources of agency authority to conduct balancing analyses, the particular analytical method selected by the agency and any conflicts with the applicable governing legislation, methodological limitations of the selected analytical approach and how they are addressed, the timing and weight afforded the analyses, due process safeguards, and public participation and opportunity for review.[253]

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[253] The author included these suggestions in a report to the Administrative Conference of the United States (ACUS), note 135 *supra*, which formed the basis of this Article. The ACUS adopted a recommendation based in part on this report for improvement of agency cost-benefit practices at its semi-annual plenary session in June 1979. *See* 44 Fed. Reg. 38,817-26 (1979) (to be codified in 1 C.F.R. pt. 305):

> § 305.79-4 Public disclosure concerning the use of cost-benefit and similar analyses in regulation (recommendation No. 79-4).
>
> (a) Federal agencies must frequently weigh competing health, safety, resource management, environmental, economic, and other societal interests when seeking to achieve a prescribed statutory objective. Wise decisionmaking presupposes that the potential benefits and costs of the actions under consideration will be identified, will be quantified if feasible, and will be appraised in relation to each other. To give structure to the exercise of this responsibility, agencies sometimes use "cost-benefit" or similar analytic approaches to organize available information to determine the consequences of possible courses of action in terms of their costs, risks and benefits. Such techniques seek to display the projected net effects of alternative courses of action and, when properly used, can assist the decisionmaker in deciding which of the alternatives is most likely to produce a desired result.
>
> (b) The following recommendation seeks to promote openness in the decision-making process, to ensure that agencies' analytic methods are sound and that their assumptions are known, so as to enhance public confidence in the soundness of conclusions finally reached. The recommendation is not intended to promote or to discourage the use of any single kind of analysis as a framework for agency

In addition, for decisionmaking conducted pursuant to the promulgated regulation, each agency should:

—At the time of public notice of proposed rulemaking or the initiation of licensing or other regulatory proceedings, make publicly available its preliminary findings on such key considerations relating to the intended regulatory action and describe fully any actual balancing conducted; and

—At the time of final regulatory action, and thereafter, include in the decision record any revised findings on these key considerations.

The public must be fully informed about the information and assump-

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> decision-making, since this choice is normally a matter of agency discretion. The choice of analytic technique may depend on several factors, including the technical complexity of the problem, the magnitude of the impacts, the time frame for agency action, and the extent to which quantification is possible for the specific costs and benefits to be considered. Any analysis, of course, should be viewed as an aid to rational decision-making, and not as an end in itself. The intent of the recommendation will be served by giving the public adequate advance notice of the agency's proposed methodologies, either generically or by means of special notice in a particular proceeding.
>
> Recommendation
>
> 1. Agencies, as general policy though not necessarily by binding rule should adopt the practice of addressing, in their public notices of particular proceedings in which cost-benefit or similar analyses are to be used, the following points:
>
> a. Any statutory or other legal requirements pertaining to or affecting the agency's conduct of cost-benefit or similar analyses in the proceeding.
>
> b. The particular analytic technique to be followed by the agency (e.g., cost-benefit analysis, cost-effectiveness analysis, qualitative or non-numerative balancing), with a description of the method, including an identification of any analytic models preliminarily determined to be used.
>
> c. Any factual assumptions or preliminary findings of the agency to be utilized in the analyses.
>
> d. The agency's techniques for assessing and revealing uncertainties in its quantitative estimates, and making explicit the range of error associated with particular quantitative estimates.
>
> e. The agency's methods for evaluating intangible costs and benefits, for discounting future costs and benefits, and for taking account of distributional effects arising under the selected methodology, to the extent such issues are involved in the analyses.
>
> f. The stages of the proceeding at which the cost-benefit or similar analyses will be conducted and the results considered.
>
> g. The extent and nature of public participation in the design, conduct, and evaluation of the cost-benefit or similar analyses.
>
> h. The extent and manner in which the public is to be accorded access to assumptions and information used in the analyses.
>
> A statement of the weight given the cost-benefit or similar analyses, and a description of any revisions of assumptions or preliminary findings, should be included in the final agency determination and made available to the public.
>
> 2. Where a pattern of recurring decisional problems exists for which a particular analytic technique is appropriate, the agency should consider adopting a generic regulation or policy statement describing the use of that technique with respect to those problems. Agencies that have varied statutory functions may suitably formulate separate regulations or policy statements for different areas of statutory responsibility. Generic regulations or policy statements so adopted may permit the use of different techniques on an ad hoc basis where the agency determines that to be necessary. Any such regulations or policy statements should address the points listed in paragraph 1.

Id. at 38,826.

tions that form the basis of agency action, their sources, and reasons for departing from the provisions of the generic regulation.

D. A Final Perspective

The cost-benefit techniques used today are the analytical descendants of Jeremy Bentham's proposals for reforming legal decisionmaking through the use of "felicific calculus."[254] Much of the philosophical and humanistic criticism of the Bentham approach remains valid today and is reinforced by constitutional principles that reflect a more holistic approach to governance in a pluralistic society and limit the uses of economic analysis in decisionmaking. In essence, the Constitution does not require that governmental decisionmaking be premised on simplistic economic analyses.

Nevertheless, a strong argument can be made that providing the greatest good for the greatest number remains one of the essential purposes of government, and that cost-benefit analysis represents a potentially workable method to reach this objective. The Executive and its agencies have the responsibility to manage the federal enterprise rationally in order to achieve optimal use of our limited resources and optimal protection of our diverse interests. If cost-benefit analysis continues as a basis for regulatory agency decisionmaking, it must be accompanied by meaningful public participation, diligent congressional, executive, and judicial supervision, and agency "best efforts" to structure their discretion to meet the issues presented by this economic approach to the problems of health, safety, and environmental protection.

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[254] *See generally* BENTHAM'S POLITICAL THOUGHT (B. Parekh ed. 1973). See in particular ch. 5, "Of the Principle of Utility."

REPORT IN SUPPORT OF RECOMMENDATION 79-5

EXPENSE-REIMBURSING PUBLIC PARTICIPANTS IN ADMINISTRATIVE RULEMAKING: THE FEDERAL TRADE COMMISSION EXPERIENCE*

Barry B. Boyer

I. INTRODUCTION

With the enactment of section 202(h) of the Magnuson-Moss Act, the Federal Trade Commission received a novel grant of authority to "provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating" in the FTC's trade regulation rulemaking proceedings.[1] The form of the program thus established—direct payment by the agency to those who are attempting to affect its decisions—was relatively unusual. However, the general principle reflected in the Magnuson-Moss Act's compensation provision has become increasingly common and well accepted in recent years. Direct and indirect use of public funds to support private groups' participation in administrative or judicial proceedings can be found in many federal statutes, rulings, plans and regulations, and the Magnuson-Moss compensation provision is in many respects a logical outgrowth of these prior programs.

During the 1960's, constituency groups of consumers, environmentalists, welfare rights advocates and other reformers emerged and began to use litigation or intervention in administrative proceedings as a means of furthering their goals.[2] A series of precedent-setting legal victories established broad rights for such groups to participate in agency hearings and to obtain judicial review.[3] However, exercising these rights in complex proceedings was usually costly, and the groups often had minimal resources. Thus, public interest advocates began seeking ways to lower the cost of participation, or to recover litigation expenses.[4] The Federal Trade Commission was an early target of these efforts.

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* This is the first part of a two-part report submitted to the Administrative Conference. This part contains the first four sections dealing with the FTC's administration of the public participation funding program. Recommendations based on this part of the report were adopted by the Conference in December of 1979 and published in the Federal Register as ACUS Recommendation 79-5 (45 Fed. Reg. 2307, Jan. 11, 1980). The fifth section, assessing the effects of the compensation program, was submitted to the Administrative Conference under the title "Part Two, Compensating Public Participants in Administrative Rulemaking: The Federal Trade Commission Experience" (Draft of April 1980). Recommendations based on that section were adopted by the Conference in June of 1980 and published in the Federal Register as ACUS Recommendation 80-1, Section C (45 Fed. Reg. 46771, July 11, 1980).

[1] 88 Stat. 2138, § 202(h) (1) (1975); *see* text accompanying note 33, *infra.*

In the early 1970's, the FTC was presented with two related questions concerning its authority to compensate private parties for the cost of participating in agency hearings. In 1969, the Commission had ruled that, as a matter of fundamental fairness, it would not prosecute administrative cease-and desist cases against indigent respondents unless it could provide them with counsel.[5] By 1971, claims of indigency in several pending cases forced the agency to consider the scope of its authority to spend appropriated funds for this purpose.[6] At the same time, a public interest group[6a] that had intervened in an agency adjudication petitioned the Commission to reimburse the group for witness fees and discovery expenses.[7] The Commissioners' uncertainty about the legality and propriety of using agency funds to compensate participants led to an agency request that the Comptroller General issue a formal ruling on the question.[8] In response, the Comptroller issued an opinion holding that the FTC could use its appropriation to meet the travel and subsistence expenses, transcript costs, attorneys' expenses, and witness fees of impecunious respondents and intervenors, if the agency found that the expenditures were necessary to assure full and fair consideration of a pending matter.[9] A series of subsequent rulings by the Comptroller General extended this principle to a number of other agencies.[10]

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[2] For historical discussions of the emergence of these advocacy groups *see* Rabin, *Lawyers in Social Change: Perspectives on Public Interest Law,* 28 Stan. L. Rev. 207 (1976); Council for Public Interest Law, Balancing the Scales of Justice: Financing Public Interest Law in America 19-70 (1976); F. Marks, K. Leswing and B. Fortinsky, The Lawyer, The Public and Professional Responsibility 7-45 (1972). The non-legal aspects of the "public interest" movement are described in J. Berry, Lobbying for the People (paper ed. 1977).

[3] *See generally* Gellhorn, *Public Participation in Administrative Proceedings,* 2 A.C.U.S. 376, 379-86 (1972) [hereafter cited as "Gellhorn"]. Interestingly, part of the justification for creating broad rights of public participation in one of the leading cases, the first *Church of Christ* decision, was the fact that the high costs of participating would prevent a flood of litigation:

> Always a restraining factor is the cost of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome. Moreover, the listening public seeking intervention in a license renewal proceeding cannot attract lawyers to represent their cause by the prospect of lucrative contingent fees, as can be done, for example, in rate cases.

Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966).

[4] *See generally* Council for Public Interest Law, Balancing the Scales of Justice: Financing Public Interest Law in America 57-76 (1976) [hereafter cited as "Council for Public Interest Law"].

[5] In re American Chinchilla Corp., 76 F.T.C. 1016, 1034-39 (1969). In a unanimous opinion by Commissioner Jones, the FTC reasoned that failure to provide indigent respondents with counsel could constitute a denial of due process of law:

> We have no doubt that in a proper case where an adequate showing of financial inability is made out, a respondent is entitled to counsel. We can think of nothing less conducive to fairness and due process in administrative procedures than to pit the power of the State, armed with all of the panoply of the legal machinery (funds, investigatory resources, staff of skilled attorneys, etc.), against a single individual and then to deny that individual the right to counsel when he denies the allegations and specifically asserts that he cannot afford counsel.

Id. at 1037.

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[6] In *American Chinchilla,* the Commission had avoided the question by dismissing the complaint with respect to the respondent who claimed indigency. However, the opinion suggested that hearing examiners (ALJ's) encountering this problem in future cases should refer the claimant to a local bar association or legal aid agency. 76 F.T.C. at 1038.

The case which forced the Commission to deal with the question of how to implement a compensation program was In re Universe Chemicals, Inc., 77 F.T.C. 598, 635-36 (1970). The agency responded by developing more detailed procedures for passing upon indigency claims, In re Universe Chemicals, 77 F.T.C. 1651-54 (1970), by arranging for volunteer counsel through the American Bar Association's Section on Antitrust Law, *cf.* In re Universe Chemicals, Inc., 77 F.T.C. 1673-74 (interlocutory order), and by issuing a policy statement institutionalizing these approaches, Statement of Policy, 35 F.R. 18998 (Dec. 15, 1970), CCH Trade Reg. Rep. ¶9621.654. However, there was some concern within the agency that these measures might not be adequate if a substantial number of indigency claims were presented.

[6A] By using the term "public interest group," this Report does not intend to take a position in the long, tedious and generally unenlightening debate over whether consumer, environmental, welfare and minority rights, and similar groups actually serve "the public interest." The phrase is simply used here, as it generally seems to be in the legal vernacular, as a shorthand reference for constituency or membership organizations which generally do not have a sufficiently large and individualized economic stake in the outcome of an administrative or judicial proceeding to make financial support of participation by individual members or constituents economically rational. "Collective goods organization" might be a more accurate title, but that phrase has not entered the general usage, so "public interest group" will have to do.

[7] Students Opposing Unfair Practices (SOUP) were granted leave to intervene in the deceptive practices case pending against the manufacturer, for the limited purpose of producing evidence and argument on the question of whether corrective advertising and restitutionary remedies, which had not been recommended by staff counsel supporting the complaint, should be imposed. In re Firestone Tire and Rubber Co., 77 F.T.C. 1666 (1970) (opinion and order granting limited intervention); *see also* In re Campbell Soup Co., 77 F.T.C. 664 (1970). SOUP requested that the Commission grant them to leave to proceed *in forma pauperis* and provide them with three kinds of financial assistance: exemption from the rules requiring that multiple copies of documents be filed; reimbursement of expenses incurred in conducting discovery; and payment by the FTC of witness fees. In re Firestone Tire and Rubber Co., 78 F.T.C. 1572 (1971) (interlocutory order).

[8] *See* 78 F.T.C. at 1573 (1971).

Despite these favorable rulings on agency power to reimburse participants, little was actually done during the early 1970's to implement any direct compensation programs. The Administrative Conference of the United States rejected a proposed recommendation encouraging agencies to establish experimental reimbursement programs,[11] and even the FTC refrained from further action in the field.[12] In part, this quiescence may have resulted from the agencies' unwillingness to undertake such a potentially costly and controversial program without a clear mandate and an additional appropriation;[13] also, there was some uncertainty as to whether the courts would agree with the Comptroller General's expansive construction of agency funding power as a result of the prolonged *Greene County* litigation.[14] The public interest groups themselves may not have put a high

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[9] Opinion of the Comptroller General B-139703 (July 24, 1972), reprinted in *Hearings on S. 2715 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 94th Cong., 2d Sess, 474 (1976) [hereinafter cited as *Hearings on S. 2715*]. The opinion stated in part:

> The appropriations for the Commission are normally available for "necessary expenses." . . . [T]he appropriations are enacted in the form of lump sums with no specific limitations as to use. Thus, the determination of what constitutes "necessary expenses" is left to the reasonable discretion of the Commission.
>
> . . . The litigative aspects of proceeding before the Commission must be reviewed in the context of a mandate broader than the provision of a forum for the "judicial" settlement of differences between contesting parties.
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> . . . When Commission proceedings are viewed in this context, it is clear, apart from the basic rights enunciated in the Chinchilla case, that the Commission is authorized to determine the administrative necessity for full preparation of cases before it in connection with the proper execution of its functions. It follows that the use of Commission appropriations to assure such full preparation of cases by impecunious litigants would constitute a proper exercise of administrative discretion regarding the expenditure of appropriated funds.

[10] *See generally* Note, *Funding Public Participation in Agency Proceedings,* 27 Am. U.L. Rev. 981, 984-88 (1978). Some of these subsequent rulings refined and elaborated the standards for agency reimbursement. For example, the Comptroller General's opinion on the Nuclear Regulatory Commission covered two types of financial relief to public participants not discussed in the FTC opinion: providing them with access to agency staff members, and creation of an independent public counsel office or a similar entity within the agency. The Comptroller General ruled that both types of expenditures would be improper under existing statues. In discussing access to information made available by the Freedom of Information Act,the agency could not deploy its staff "to provide a participant's technical expertise" because "the staff is to serve NRC's needs and may not be used to prepare or assist, other than incidentally, those taking an adversary position in NRC's proceedings." Opinion of the Comptroller General B-9228 (Feb. 19, 1976), in *Hearings on S. 2715* at 292. In dealing with related proposals to establish an independent "public counsel's office" or "independent intervenor assistance centers" outside the agency, the opinion concludes that the NRC "does not have authority to use its appropriation to finance independent entities not within the jurisdiction and control of the agency." *Id.*

Later opinions have also liberalized the test for determining whether an applicant's participation is necessary:

> [T]he applicant's participation no longer must be essential to dispose of the matter. Participation now is considered necessary if the agency determines that a particular expenditure for participation reasonably can be expected to contribute substantially to a full and fair determination of the issues before the agency.

Note, *supra*, at 987. *Compare* Opinion of the Comptroller General B-192784 (Jan. 10, 1979) Nuclear Regulatory Commission lacks authority to reimburse private attorney for out-of-pocket expenses incurred in agency proceeding to investigate misconduct charges against him).

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[11] Recommendation 71-6, Public Participation in Administrative Hearings, 2 A.C.U.S. 35 (1971); *see also id.* at 39-42 (separate statements of members relating to funding issue).

[12] One study of public participation concluded that the FTC "tended toward restrictive application" of its intervention criteria, and as a result admitted few potential compensation-seekers to its adjudications. Committee on Governmental Affairs of the United States Senate, Study on Federal Regulation, Vol. III: Public Participation in Regulatory Agency Proceedings 47 (1977).

[13] The Nuclear Regulatory Commission's statement accompanying its decision not to establish a direct funding program, 41 F.R. 50829, 50831 (Nov. 18, 1976), expresses this rationale in part:

> Funding involves the direct transfer of public money to support a private viewpoint; a viewpoint which is not subject to control or oversight by the public's elected representatives and which may or may not reflect the views of many members of the public. . . . From our perspective, we lack not only the statutory authority to provide funding, but we also find, as a policy matter, that a non-elected regulatory commission is not the proper institution to expend public funds in this fashion absent express Congressional authorization.

[14] *See* Greene County Planning Board v. FPC, 559 F. 2d 1237 (2d Cir. 1977) (*en banc*), *cert. denied,* 434 U.S. 1086 (1978). When certiorari was finally denied in *Greene County,* the controversy had been pending before the agency and the courts for approximately a decade. Brief for the Federal Energy Regulatory Commission on Petition for a Writ of Certiorari, No. 77-481, at 3-8 (U.S. Sup. Ct., Oct. Term, 1977). The history of the compensation issue is summarized as follows:

> In June 1971 petitioners moved that [the utility which had applied to construct a power line], or the Commission, pay the expenses, including expert witness fees and attorneys' fees incurred by them in the proceeding. . . . In October 1971 the Commission denied petitioners' motions, 46 F.P.C. 1101, and a petition for review followed. Greene County Planning Board v. Federal Power Commission, 455 F. 2d 412 (C.A. 2) ("Greene County I"), certiorari denied, 409 U.S. 849.
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> . . . On the question of expenses and fees . . . the court [in *Greene County I*] declined to order the Commission to reimburse petitioners. The court noted that while the Commission's order denying such payments appeared to be based on the Commission's view "that it had no authority to grant them," the Commission had argued to the court "that it has foreclosed only the present award of fees and has left open the question of whether ultimately to award them when the proceedings have come to an end." . . .
>
> Following the court's remand, the Commission . . . conducted a proceeding that included a lengthy hearing in which petitioners participated. . . . With respect to petitioners' renewed motion for reimbursement of their fees and expenses, the Commission reaffirmed its earlier denial.

Id. at 3-5. On appeal of the final decision, the Second Circuit *en banc* affirmed the Commission's denial of funding, stating: "The authority of a Commission to disburse funds must

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priority on convincing the agencies or the Congress to establish direct funding programs. Foundation support for public interest law was relatively plentiful in the early years of the decade, [15] and there still appeared to be a good chance that consumer and environmental groups could persuade the courts to adopt fee-shifting rules that would enable public interest litigants to recover litigation expenses from the regulated industry. Other methods of funding consumer advocacy, such a check off system[16] or the establishment of offices of public counsel within the agencies[17] or creation of

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come from Congress . . . and it is for Congress, not the Comptroller General, to set the conditions under which payments, if any, should be made." 559 F.2d at 1239. The Justice Department subsequently took the position that *Greene County* should be limited to its facts, and that it could not prevent other agencies from funding public participants. *See* Legal Times of Washington, June 26, 1978, at 4; Letter from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, U.S. Dept. of Justice, to Linda Heller Kamm, General Counsel, Department of Transportation, March 1, 1978, at 2:

> Because the holding of the Second Circuit in *Greene County* involved only a construction given to the Federal Power Act . . . we think it clear that no department or agency . . . other than possibly FERC is bound by that holding. Nor do we think that the Second Circuit . . . announced a principle of law broad enough to cover other departments and agencies.

[15] *See generally* Council for Public Interest Law at 226-238; Foster, *Playing It Safe on $11 Million a Year,* Juris Doctor, June/July 1973, at 9, 10-12, 15 (describing public interest programs supported by Ford Foundation).

[16] *E.g.,* Nader, *Consumerism and Legal Services: The Merging of Movements,* in The Role of Research in the Delivery of Legal Services: Working Papers and Conference Proceedings 97, 101-102 (L. Brickman & R. Lempert, eds., paper ed., May 1976);

> A group of us are trying to institute what could undoubtedly be the single most effective innovation in the history of the consumer movement: the consumer check off. During the next year we will be pressing twenty states . . . to adopt consumer check off laws in the utility area. . . . [S]tate law could then require all regulated utilities to have a check off box on every bill they send which permits their customer to volunteer any level of contribution that they wish in any month. That contribution to the bill, and . . . accumulated voluntary contributions, are transferred . . . to a statewide consumer action group. . . . The council of directors would hire attorneys, economists, accountants, physicists, engineers, health specialists, organizers, writers, and all the other people necessary to represent consumers in all branches of government on any issues relating to utility policy.

Many of the Nader-inspired public interest research groups (PIRG's) are supported by a similar "check off" system involving student fees at colleges and universities.

[17] The idea of establishing separate consumer advocacy offices within the agencies traces back at least to the New Deal. *See, e.g.,* Nelson, *Representation of the Consumer Interest in the Federal Government,* 6 Law & Contemp. Prob. 151 (1939). For a discussion of more contemporary versions of this approach, *see generally* Note, *Federal Agency Assistance to Impecunious Intervenors,* 88 Harv. L. Rev. 1815, 1819-1822 (1975); Murphy & Hoffman, *Current Models for Improving Public Representation in the Administrative Process,* 28 Ad. L. Rev. 391, 402-407 (1977): Bloch & Stein, *The Public Counsel Concept in Practice: The Regional Rail Reorganization Act of 1973,* 16 Wm. & Mary L. Rev. 215 (1975); Report of the Comptroller General of the United States, Organizing the Federal Communications Commission for Greater Management and Regulatory Effectiveness 23-24 (July 30, 1979).

an independent consumer advocacy agency,[18] also had widespread support.

By the time that the Magnuson-Moss compensation program came into existence, however, the outlook for funding public interest representation in administrative proceedings had become much less promising. The foundations, having provided "seed money" to establish advocacy groups, were cutting back on general support for public interest representation and limiting their grants to particular program areas.[19] In 1975, the Supreme Court's decision in the *Alyeska* case[20] made it clear that the courts and the agencies lacked power to compensate public participants by "fee-shifting" arrangements that would impose these costs on the regulated industry. Later, the proposal to create a new Consumer Advocacy Agency was defeated in Congress despite Administration support and a vigorous lobbying effort by its proponents.[21] Thus, in the late 1970's direct funding approaches similar to the Magnuson-Moss program became one of the few remaining alternatives for providing significant amounts of funding to support public participation in administrative proceedings.

The direct funding approach gained widespread support within the legal profession, as reflected in the endorsements of the American Bar Association[22] and a Committee of the Association of the Bar of the City of New York.[23] In recent years the agencies themselves—with some prodding from the White House[24]—also became more receptive to direct funding. Several departments and agencies established "implied authority" compensation programs based on the Comptroller General's rulings,[25] and one agency, the Agriculture Department, successfully defended its power to support public participation in a court challenge brought by the Chamber of Commerce.[26] At the same time that support for extension of the Magnuson-Moss approach seemed to be growing, however, political resistance to direct funding increased. Bills to establish general direct funding programs were

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[18] *See* New York Times, April 7, 1977, at Al, col. 2; June 30, 1977, at A10, col. 3; Nov. 2, 1977, at A19, col. 6.

[19] *See generally* Council for Public Interest Law at 234-35; Terris, *Hard Times Ahead for Public Interest Law,* Juris Doctor, July-Aug. 1974 at 22; Jaffe, *Public Interest Law-Five Years Later,* 62 A.B.A.J. 982 (1976).

[20] Alyeska Pipeline Co. v. Wilderness Society, 95 S. Ct. 1612 (1975). The District of Columbia Circuit, which had been reversed by the Supreme Court in the *Alyeska* decision, later concluded that the *Alyeska* rationale governed questions of the agencies' power to order fee-shifting; thus, neither a court nor an agency could require payment of an adverse party's attorneys' fees without explicit congressional authorization. Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975). For an example of a statute authorizing such fee shifting, *see* The Public Utility Regulatory Policies Act of 1978, section 122, 92 Stat. 3117, 3129-30 (1978).

[21] [Add cite]

[22] *See generally* Special Committee on Public Interest Practice of the American Bar Association, Implementing the Lawyer's Public Interest Practice Obligation (1977); *Public Interest Law: Down But Not Out,* 63, A.B.A.J. 161 (1977); American Bar Association Commission on Law and the Economy, Federal Regulation: Roads to Reform 124-126 (Exposure Draft, 1978); Statement of Sara-Ann Determan, member, Special Committee on Public Interest Practice of the American Bar Association, Before the Subcommittee on Administrative Practice and Procedure of the Senate Subcommittee on the Judiciary Concerning Public Participation Funding in Federal Agency Proceedings (July 20, 1979).

[23] *See generally* Committee on Federal Legislation, *Attorneys Fees for Public Interest Participation in Federal Agency Proceedings,* 31 Record of the Association of the Bar of the City of New York 675 (1976). This Committee concluded that the basic issue of the desirability of funding such participation was no longer open to dispute:

> In the last decade of Congress has held over 25 hearings dealing with the need for

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> greater public participation in the administrative process. The record compiled establishes that greater public participation in agency proceedings will be of great value to a fair determination of the overall public interest. . . .
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> . . . . .
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> . . . A consensus appears to have been reached that the agencies will perform more expertly in the public interest if they receive input from independent sources who have no significant economic stake in the outcome of the proceedings.
>
> Balance among the viewpoints expressed before federal agencies is essential.

Id. at 679-80.

[24] In the wake of the defeat of the consumer advocacy agency bill, the Carter Administration took several steps to increase consumer advocacy. One step was "increasing the policy-making power of his in-house consumer advocate, Esther Peterson." The Washington Post, May 1, 1978, at D9, col.1. According to newspaper accounts, this approach was functionally similar in some ways to the consumer advocacy agency:

> Peterson will now be able to express her opinion on any issue that would affect consumers before the President's decision memorandum on that issue is prepared . . . She will report on the effect any administrative action would have on consumers. . . .

Id. In addition, the Administration's 1978 Executive Order on Improving Government Regulations directed the agencies to "give the public an early and meaningful opportunity to participate in the development of agency regulations." E.O. 12044, 43 F.R. 12661, 12662 (March 24, 1978). Subsequently, the President issued a memorandum to the heads of Executive departments and agencies urging them to examine the scope of their existing power to compensate public participants, and to consult with the White House staff concerning the existence and use of this authority. Memorandum from the President on Public Participation in Federal Agency Proceedings, 15 Weekly Compil. Pres. Docs. 867 (May 16, 1979). A direct funding provision was also incorporated in the Administration's regulatory reform bill introduced in the Ninety-Sixth Congress *See* Appendix B, *infra*.

[25] *See, e.g.*, 43 F.R. 23560 (May 31, 1978) (Consumer Product Safety Commission Interim Policies and Procedures for Temporary Program); 42 F.R. 2864 (Jan. 13, 1977) Department of Transportation National Highway Traffic Safety Administration Final Rule and Advance Notice of Proposed Rulemaking); 43 F.R. 17806 (Apr. 26, 1978) (Final Rule, National Oceanic and Atmospheric Administration, Department of Commerce). *See also* 44 F.R. 17507 (March 22, 1979) (U.S. Dept. of Agriculture Notice of Proposed Rulemaking); 44 F.R. 23044 (Apr. 17, 1979) Food and Drug Administration Proposed Rule); 43 F.R. 30834 (July 18, 1978) (Federal Communications Commission Notice of Inquiry). [Follow up CAB proposal eff. Nov. 28, 1978].

[26] Chamber of Commerce v. Dept. of Agriculture, No. 78-1515 (D.D.C., Oct. 10, 1978), 106 Daily Washington Law Reporter 2113 (Nov. 22, 1978).

introduced in the Ninety-Fourth and Ninety-Fifth Congresses,[27] but none of these provisions generated sufficient support for final passage. During the Ninety-Sixth Congress, several of the major regulatory reform bills, including the Administration proposal, contained direct funding provisions.[28] These proposals were sharply attacked by business and industry groups,[29] and during 1979 the FTC's compensation program became a target of congressional and public criticism.[30] Issue was joined on many levels, ranging from disputes over the details of program administration to more fundamental questions of whether it is proper for government to fund private groups which are trying to influence regulatory policy decisions.

The Magnuson-Moss Act compensation program provides an opportunity to explore some of these issues in the context of the FTC's experience in administering the oldest and largest of the direct funding systems.[31] By early 1979 when data collection for this study was completed, the Commission had acted on compensation applications from more than a hundred groups and individuals, and had obligated approximately $1.8 million dollars.[32] This body of experience seems adequate to support at least tentative conclusions about the functioning of the FTC's compensation program. As is usually the case in field research, more time and additional data-gathering would have been helpful. Ending data collection in January of 1979 forced the omission of all information concerning the Standards and Certification rulemaking, and permitted only very limited investigation of the Children's Advertising proceeding, and these were two very important and controversial trade regulation rules. Moreover, very few proceedings in which compensated groups participated had reached the stage of final FTC action by that time, and so it is more than normally difficult to draw firm conclusions about the ultimate impact of the compensation program on agency decisions. Nevertheless, the patience of researchers, research subjects, and (most importantly) granting agencies had very definite limits, and this four-year project tested if not exceeded those limits. There is also something to be said for publishing research results before they become matters of merely historical interest.

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[27] *See* S. 2715, 94th Cong. 1st Sess. (1978); H.R. 13901, 94th Cong., 2d Sess. (1976); S. 270, 95th Cong., 1st Sess. (1977); H.R. 3361, 95th Cong., 1st Sess. (1977); H.R. 8798, 95th Cong., 1st Sess. (1977).

[28] The principal features of several of these regulatory reform proposals are summarized in Appendix B.

[29] *E.g.*, Hearings on Regulatory Reform Legislation Before the Senate Committee on Governmental Affairs, May 4, 1979 (Prepared Statement of James D. "Mike" McKevitt, Washington Counsel, National Federation of Independent Business at 18-19; Proposed Statement of William L. McKinley on Behalf of the National Association of Manufacturers at 12-14).

[30] *See, e.g.* "Senate Panel Grills Pertschuk on Funding of FTC Consumer Groups," Antitrust & Trade Reg. Rptr. (ATRR), March 19, 1979 at A-5; "FTC Public Funding of Private Groups Comes Under Attack in Senate Hearing," ATRR, May 3, 1979, at A-12 to A-13; "Senate Commerce Committee Supports Controls on FTC Public Participation Program," ATRR, May 24, 1979, at A-20 to A-21; "FTC Public Participation Funding Is Focus of Commerce Committee Actions," ATRR, May 10, 1979, at A-18 to A-20.

The debate over the FTC's funding program has also reached the mass circulation press. Syndicated columnist James J. Kilpatrick concluded:

> Ninety percent of the [FTC compensation] money has gone to "public interest" groups whose whole reason for being is to encourage more federal rules and regulations.
>
> The FTC has no more business paying tax funds to witnesses than a committee of Congress would have in paying Ralph Nader to testify on a consumer protection bill. The rule ought to be that all witnesses stand equally at the bar, but with the FTC's slush fund, some are more equal than others.

Buffalo Evening News, June 1, 1979, at 20, cols. 6-7. FTC Chairman Pertschuk responded in the editorial pages of The Washington Post:

> [T]he Chamber of Commerce, the toy manufacturers and some congressmen have generously offered to relieve us of the necessity of having to listen to consumer and small business advocates by urging termination of the public participation program. . . .
>
> This would leave the opportunity of criticizing our staff's proposals to those business interests that can afford to do so (helped, of course, by their right to deduct the cost of whatever they spend from their taxable income). . . .
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> . . . . .
>
> As an individual commissioner, I know that I have benefited enormously from this clash of advocacy [that the program makes possible].

The Washington Post, June 26, 1979, at A-19, col. 6.

Numerous information sources were used in reviewing the FTC's administration of the Magnuson-Moss Act compensation program. All available FTC files relating to the processing of compensation applications were reviewed, and additional internal agency documents were provided by the FTC. Since some of these internal documents were received pursuant to a confidentiality agreement, it has sometimes been necessary to provide "blind" citations to nonpublic documents. A second principal source of information was interviews with interested persons—FTC officials administering the program, Presiding Officers and staff attorneys assigned to the rules, and the compensation applicants themselves. Survey research questionnaires administered to witnesses in seven early Magnuson-Moss rulemakings were also used, along with reviews of hearing transcripts and other public record documents.

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[31] One other agency, the Environmental Protection Agency, has statutory direct funding power under the Toxic Substances Control Act similar to the FTC's Magnuson-Moss authority. *See* 15 U.S.C. § 2605(c) (4) (1976); 42 F.R. 60911 (Nov. 30, 1977). However, as of mid-1979, the EPA had received only two compensation applications under this provision. Telephone Interview with William Pedersen, Office of General Counsel, Environmental Protection Agency, May 22, 1979. See also 42 F.R. 1492 (Jan. 7, 1977) (EPA advance notice of proposed rulemaking on a proposal to create a general compensation program). EPA has grant or contract authority to defray some costs of public participation under other statutes it administers, but these programs are sufficiently different in design and execution from the Magnuson-Moss direct funding system that they will not be discussed in this paper. *See, e.g.*, 43 F.R. 34794 (Aug. 7, 1978). *See also* §122(b) of the Public Utility Regulatory Policies Act of 1978, 92 Stat. 3117, 3129-30 (1978).

[32] Data tabulated from Appendix A. The total of 109 applications was derived by counting each person or group who applied for compensation in each proceeding as one "applicant," and excluding any supplemental or amended applications they may have filed. As discussed below, the total of 109 applicants includes several groups which applied in more than one proceeding.

The schedule for consideration of this report by the Administrative Conference has made it necessary to produce the draft in two stages. This segment deals only with the FTC's administration of the program; the second installment will attempt to assess the effects and impacts of compensated participation.

II. THE STATUTE

Although the text of section 202(h) of the Magnuson-Moss Act describes in general terms the kinds of expenses that the FTC can reimburse and the standards that the agency must apply in passing upon requests for compensation, it leaves unresolved a great many questions of detail and interpretation. In its entirety, the major substantive section of the compensation provision states:

> The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceedings, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceedings because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceedings.[33]

This provision was added to the bill in conference committee, and the relevant portion of Conference Report is largely a paraphrase of the statutory text.[34] However, second-hand reports of the drafters' intent indicate that the "financing proviso emanated from the . . . Conferees' belief that, since the new statue substantially formalized the FTC's rulemaking procedures, compensation for intervenors would better enable them to participate effectively in the newly structured hearings."[35]

While the broad language of the statute, the novel character of the direct funding approach and the minimal legislative history combined to give the FTC great discretion in developing the compensation program, these same factors meant that the Commission had little guidance or experience to fall back on when difficult problems arose. As later events demonstrated, several basic questions and dilemmas were implicit in the Act.

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[33] 15 U.S.C. § 57a (h) (1) (1976).

[34] H.R. Rep. 93-1606, *infra* note 36.

[35] Boasberg, Hewes, Klores & Kass, Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings 38 (NUREG-75/071, July 18, 1975) (summarizing interviews with staff of the Senate Commerce Committee).

(1) Section 202(h) reflects Congress' willingness to underwrite the full range of expenses associated with public participation[35a]—but only to the extent that the applicant is financially unable to pay these expenses and the participation is necessary to a fair decision. Taken together, these standards can open up some potentially complex and delicate areas of inquiry, including assessment of the financial condition and motivation of the applicant, forecasts of what other participants will do at later stages of the proceedings, and determinations of what kinds of participation are necessary or desirable in a complex hybrid rulemaking process. The answers to the latter question could well vary depending upon whether one emphasizes the "grassroots," participatory-democracy aspects of Magnuson-Moss rulemaking, or its technical dimensions which give preeminence to lawyers, economists and other experts.

(2) In defining the categories of participants who are eligible for compensation, the statute heavily emphasizes the applicant's stake in the outcome of the rulemaking and the unfairness of excluding him from the proceeding. The applicant must have, or advocate, an interest that is not adequately represented in the proceeding, but which should be represented as a matter of fairness. The statute does not speak directly to an alternative basis for justifying compensation, which would focus upon the usefulness and relevance of the data or argument that the applicant wished to present. However, the Conference Committee report does reflect some congressional intent that the compensation authority be administered to improve the quality of FTC decisions by making available to the agency a broader spectrum of views and information.[36] The tensions between these two approaches—which might be

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35A. At least, there has been no serious challenge to this proposition in practice. During the early stages of implementing the program there was some concern within the agency that, because the statutory language of the compensation provision seemed to track the Magnuson-Moss Act's provisions dealing with resolution of disputed issues of material fact, the agency might not be able to fund activities which were not specifically directed toward resolution of these issues—for example, submission of prehearing written comments. That interpretation was rejected as overly formalistic, since anything contained in a written comment could be presented orally at a hearing, and the FTC clearly had authority to fund hearing testimony. Confidential FTC Document 36.

David B. H. Martin, Research Director of the Administrative Conference during most of the period covered by this study, has suggested another possible limiting interpretation of the statute: that the agency could fund participants to present testimony, but not to produce new evidence—for example, by conducting surveys or other field research. This interpretation has apparently never been considered by the FTC, and the legislative history provides no indication of congressional intent on this point. As a policy matter, however, it seems likely that newly "created" evidence of this kind, specifically tailored to the issues in the proceeding, will be some of the most useful information for agency decision-makers.

36. H.R. Rept. 93-1606, *reprinted in* ATRR, Dec. 24 1979, at F1, F11 (emphasis added): "In order to provide to the extent possible that all affected interests be represented in rulemaking proceedings *so that rules adopted thereunder best serve the public interest,* the FTC is authorized to provide compensation for reasonable attorneys and expert witness fees and other costs of participating . . . " *See also* note 37, *infra.*

termed the "fairness" justification and the "utility" rationale—became evident in the FTC's early efforts to implement the compensation program.

(3) The statute provides some guidance to the agency as to the funding allocation it should make when requests for compensation funds exceed available resources. The total annual authorization for compensation funds is limited to one million dollars, and no more than 25 percent of this amount may be given to members or representatives of the regulated industry.[37] However, the situation that arose in practice was quite different. Throughout most of the period covered by this study, available funds exceeded qualified applications, and the issue that emerged was whether the compensation awards were concentrated too narrowly within a circle of "repeat player" consumer groups and law firms.[38] Moreover, the ceiling on the proportion of compensation funds allocated to industry groups was largely irrelevant because the volume of applications from business interests was generally negligible in the early years of the compensation program, and never approached the statutory ceiling. As this became apparent, the FTC faced a policy question as to whether they should make special efforts to encourage more businessmen to apply so that the proportion of funds granted to business interests would move closer to 25 percent.

(4) While the statute contains a specific authorization of funding to support public participation, it does not provide an accompanying allocation of funds or support personnel to administer the program. The Act also did not provide any guidance as to how compensation decisions should be made within the agency—what persons or organizational units should have responsibility for granting or denying compensation applications, whether and to what extent the rulemaking staff should be involved in the decision, what procedural rights applicants should have, and the like. These factors, together with the FTC's complete lack of experience in running any comparable grant programs, caused some problems and delays in the early administration of the compensation program. Later, as staffing problems were resolved and experience accumulated, the quality of program administration improved markedly.

III. CRITERIA OF ELIGIBILITY

A. Drafting the Rules and Guidelines

One of the more difficult tasks that the FTC faced in implementing the compensation program was translating the broad generalities of the statute into operational standards that could be used in passing upon individual requests for funding. Despite the directive in the statute to make rules governing grants of compensation,[39] the Commission moved rather slowly to define and elaborate the standards that applicants would have to meet in order to be eligible for compensation.

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[37] 15 U.S.C. § 57a(h) (2) - (3) (1976).

[38] *See* Part V.B. of the text, *infra.* In some measure, the FTC's failure to anticipate this problem might be attributable to language in the Conference Committee report, *supra* note 36, at F-11, which seemed to direct the agency to start dispensing compensation funds promptly, without being overly cautious in the application of criteria. "Because the utilization of these funds may be critical to the full disclosure of material facts in rulemaking proceeding," the Report notes, "the conferees expect the Commission to assign a high priority to their proper expenditure."

Early in 1975, soon after the Magnuson-Moss Act was signed into law, a working group of FTC staff members from the Bureau of Consumer Protection and General Counsel's Office met to develop plans for implementing the sections of the statute dealing with the trade regulation rulemaking.[40] Proposed rules of practice for TRR proceedings, including the compensation program, developed out of these planning efforts, with most of the actual drafting performed in the General Counsel's Office. Interviews with some of the participants in these early planning efforts[41] suggest that the compensation program received relatively little attention: other procedural issues evidently seemed more important to resolve in order to create a workable rulemaking process, and in any event the compensation section of the statute gave the FTC substantial discretion. In short, the major threats of obstruction by adverse parties, and reversal on judicial review, seemed to lie elsewhere.[42]

The draft rules of practice for trade regulation rulemaking proceedings were published for comment in the Federal Register in early April of 1975.[43] Approximately 30 comments were filed in response to this notice, but only two discussed the compensation program at any length[44] and these had little effect upon the shape of the final compensation rule that was promulgated in August of that year.[45] This final rule dealt with eligibility criteria in a rather cursory fashion. The first subsection of the rule, captioned "purpose of compensation,'' simply tracked the statutory language on interest representation. The ''interest'' itself was defined as one which (a) necessarily must be represented ''for a fair determination of the rulemaking proceeding taken as a whole'' and (b) would not otherwise be adequately represented in the proceeding. The applicant who had or represented such an interest was required to demonstrate that effective participation was impossible without compensation.[46] Other sections of the rule, prescribing the information to be included in the application for compensation, gave more detailed content to the financial inability standard. A person or organization seeking compensation was required to describe not only its own resources, but also the resources ''of the interest represented by the applicant.''[47] This was a step beyond the language of the statute, which required that the person applying have insufficient resources to participate, but said nothing about the financial resources of the interest which the applicant purported to represent. A rule which looked only to the resources of the person applying would create a risk that any interest group, however wealthy, could recruit an indigent to ''front'' for them and seek compensation. Yet, the approach taken by the Commission had a complementary problem: any trade practice which threatened a large number of consumers would create an ''interest'' with substantial dollar resources, and might therefore make the consumer interest ineligible for compensation. The solution employed in the rules of practice was to require that the applicant evaluate ''the feasibility of contributions to the costs of participation by individual representatives of the interest.''[48] Presumably, it would not be feasible to generate contributions from dispersed consumers whose individuals economic stake in a proposed rule was small or speculative.

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[39] 15 U.S.C. § 57a(h) (1) (1976) provides that "[t]he Commission may, pursuant to rules prescribed by it, provide compensation . . . "

[40] Interview with Barry Rubin, Office of General Counsel, FTC, March 17, 1976.

[41] *Id.*; Interview with James V. DeLong, Assistant Director, Bureau of Consumer Protection, FTC, March 10, 1976.

[42] Internal memoranda indicate that some FTC staff members were considering compensation issues in some detail, but this staff work did not result in the adoption of detailed criteria, perhaps because of the difficulty of gaining consensus within the agency. Confidential FTC Documents 1-4.

[43] 40 F.R. 15,238 (April 4, 1975).

[44] One of these comments was submitted by former FTC Commissioner Mary Gardiner Jones, who was at that time a Professor of Law at the University of Illinois. The other was prepared by a consortium of public interest groups headed by Paul Gewirtz, an attorney for the Center for Law and Social Policy, who was joined on the submission by Charles Halpern and Neil Levy of the Council for Public Interest Representation. FTC Docket No. 222-3-1 (unpaginated).

[45] 40 F.R. 35, 966 (Aug. 13, 1975). There were few changes from the compensation rule originally proposed, and these could fairly be characterized as minor and stylistic.

As the FTC began to receive and act upon applications for compensation, it soon became apparent that the rules of practice had left open numerous questions concerning not only the criteria of eligibility, but also the activities that could be compensated, the amounts that could be paid, and the procedures by which compensation decisions would be made. By June of 1976, a rough draft of supplementary guidelines for applicants was prepared and circulated to interested persons. This draft was revised several times,[49] and final guidelines were published in the Federal Register in June of 1977.[50]

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[46] 16 C.F.R. § 1.17(a) (1977). These provisions were repeated in the section of the rules dealing with the information that applicants had to submit in their request for compensation, *id.* at § 1.17 (c) (1) - (3).

[47] *Id.* at § 1.17 (c) (4) (iii).

[48] *Id.* at § 1.17 (c) (4) (ii).

[49] Revised drafts were circulated in August of 1976, February of 1977, and April of 1977.

[50] 42 F.R. 30,480 (June 14, 1977). The Commission was evidently somewhat sensitive about publishing guidelines for public participation without first providing a public comment period, since the preamble to the final guidelines states:

> The Bureau of Consumer Protection has solicited the viewpoints of interested parties in preparing these Guidelines. As finally drafted, the Guidelines reflect extensive comments

(Continued)

Pre-publication drafts of the guidelines were distributed to potential applicants and other interested persons, but it is not clear how many applicants received these drafts, or how useful they were. Thus, during nearly two years of intense rulemaking activity which gave rise to numerous requests for compensation, the only authoritative standards generally available to potential applicants were the vague phrases in the statute and the rules of practice. This lack of clear standards caused problems both inside and outside of the agency. In several instances during the pre-Guidelines phase of the compensation program, applicants sought guidance from the staff attorneys assigned to the rulemaking, and were encouraged to apply for compensation (if not virtually assured that their requests would be granted). When the requests were denied as inconsistent with the evolving criteria or withdrawn after disputes with the agency, the applicants were understandably angry and felt that they had been the victims of a deception or a political decision.[51] In these incidents, the staff attorneys may simply

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comments received from consumer groups, industry, Congressional committees and members of the public.

The Guidelines were adopted by the Bureau of Consumer Protection on May 31, 1977; however, the Bureau will consider amendments to them in response to further comments.

Id. The Guidelines were reportedly not published for comment because they were a Bureau document rather than a rule promulgated by the agency. Interview with Bonnie J. Naradzay, Special Assistant for the Compensation Program, Bureau of Consumer Protection, FTC, Oct. 19, 1976. However, the final Guidelines recite that "[t]he Bureau is issuing these Guidelines in conformance with the authority delegated it by the Commission's rules of practice," 42 F.R. at 30,480, and it is difficult to see why this rationale would not be applicable to publication for comment.

[51] A brief review of four incidents in which compensation applicants felt that they had been treated unfairly illustrates the problems of inconsistency that the FTC experienced as a result of its vague standards.

The first two incidents arose early in 1976, and concerned the hearings held in Chicago on the Funeral Practices rule. Michael Hirsh, a television producer who had been involved in a television documentary critical of the funeral industry, applied for compensation to become a consumer group representative (and thus eligible to cross-examine witnesses) for the Chicago hearing. After some time, he learned informally from the Presiding Officer assigned to the rule that the application had been denied because Hirsh was not an attorney and therefore was presumed to be unqualified to conduct cross-examinations. At Hirsh's request, the Presiding Officer put this explanation in writing, and also noted that Hirsh's application had been rejected because he was not affiliated with a consumer group. Interview with Michael Hirsh, May 11, 1976. At this point Hirsh sought help from the American Civil Liberties Union, which wrote a letter on his behalf requesting reconsideration on the grounds that neither the statute nor the rules of practice required compensated consumer representatives to be attorneys, or representatives of an organized consumer group. Letter from David Goldberger, The Roger Baldwin Foundation of ACLU, Inc., to Joan Z. Bernstein, Acting Director, Bureau of Consumer Protection, April 19, 1976. Three weeks later, the FTC's Acting Bureau Director issued a letter ruling formally denying Hirsh's request for compensation, primarily on the ground that his application lacked sufficient information about the substance of his proposed participation, and about the projected expenses for which he wished to be compensated. Nothing was have been unaware of the developing standards, as a result of the normal difficulties of communicating within any large bureaucratic organization; or they may have been trying to bend the rules in order to supplement the resources available to them for procuring witnesses.[52] Whatever the reasons, more precise standards could have served as a counterbalance to this tendency, and given the applicants better guidance as to how their requests would be judged. Interviews with compensation applicants show a marked change after the 1977 Guidelines went into effect. Many of those who applied before the Guidelines were issued expressed confusion or

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said about the applicant's lack of affiliation with a consumer group. Letter from Joan Z. Bernstein to Michael Hirsh; April 28, 1976. The letter also noted that "[w]hile no other consumer representative has been authorized compensation for participation in the Chicago hearings," four consumer groups had been granted compensation for participation in other phases of the rulemaking proceeding, and "[t]he statute does not require compensation of a consumer representative at every individual hearing for which such a representative applied." *Id.*

At the same time that the Hirsh application was pending, FTC staff attorneys working on the rule were actively soliciting the Consumer Federation of America to apply for compensation as a participant in the Chicago hearings. Interview with Kathleen O'Reilly, Consumer Federation of America, Feb. 16, 1977. Despite initial reluctance to get involved, a CFA representative submitted an application and began preparation for the hearing in reliance on the staff's assurances that the application would be approved. However, a series of delays and problems developed, and CFA withdrew its application shortly before the start of the Chicago hearings. Another consumer group which had earlier been granted compensation for the Washington Funeral Practices hearings was then brought in by the FTC staff as compensated consumer representative for the Chicago hearings.

Not surprisingly, these two rejected applicants were extremely critical of the FTC's administration of the compensation program. Hirsh expressed the belief, based on information obtained from sources within the FTC, that the real reason his application had been denied was because he had refused to follow the suggestions of staff attorneys who had wanted him to present testimony which would support one portion of the rule. Hirsh Interview, *supra*. Similarly, the CFA representative felt that the FTC had raised a series of minor objections to her participation because she had not been sufficiently cooperative in supporting the rule in its entirety. O'Reilly Interview, *supra*.

The other two incidents followed the general pattern of the CFA application, although they involved different rulemaking proceedings. In both instances, FTC staff members from the Chicago Regional Office contacted individuals and urged them to apply for compensation; when they did, their applications were rejected. Interview with Sidney Margolius, March 22, 1977; Interview with John C. Hendrickson, March 17, 1977. One of these applicants criticized the FTC for "arbitrary decision-making" (Margolius Interview, *supra*); the other felt he was the victim of a "hoax" or a "political decision" (Hendrickson Interview, *supra*). The latter applicant was especially upset to learn that part of the reason he was turned down was the decision-makers' doubt that he could complete the work he proposed within the amount of time estimated in his compensation application. In fact he had limited his request for compensation to 80 hours of attorney time, even though he expected to invest additional uncompensated hours, because the FTC staff had told him that this was the most the Commission would fund. Hendrickson Interview, *supra*.

[52] Confidential FTC Document 5; *see also* text accompanying notes 80-82, *infra*.

uncertainty about the standards for awarding compensation;[53] by contrast, most of the applicants interviewed during 1979 found the compensation criteria relatively clear and understandable.[54]

The delay in formulating detailed compensation standards probably was attributable more to staffing shortages and workload pressures than to any conscious agency decision to keep the standards flexible. Preparation and circulation of draft guidelines began at about the time a staff person was assigned to spend a major portion of her time administering the compensation program. The difficulty of getting approval of detailed guidelines from the Bureau Director and the Commission may also have been a factor. In any event, with the benefit of hindsight, the FTC might be criticized for not taking some steps to provide better interim guidance—for example, by treating its "action letters" containing the Bureau Director's decision on individual compensation applications as a system of precedents, and collecting them for the use of staff and applicants.[55] The difficulty is that even this modest effort probably would have exceeded the resources available during the early days of the compensation program. Through 1976 and 1977, most of the action letters were extremely conclusory documents which gave little or no explanation of the reasoning underlying the Bureau's decision. They did not become more informative until full-time staff became available to prepare detailed drafts for the decision-makers, and the responsible officials encouraged more elaborate explanations. But even if the letters had been more informative and more readily available, it is questionable whether potential users would have had the resources—including time and expertise—to sift through such a collection of documents and distill operative principles from them. As a general matter, it seems unlikely that the FTC staff attorneys working on the rules would have had the time, or that the smaller consumer groups would have had the expertise. The issuance of general rules and lay-language information pamphlets seems a much more effective method of communicating policies and standards in a program of this nature.

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[53] Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Oct. 26, 1976 (criteria lacked specificity); Interview with John Pound, San Francisco Consumer Action, Nov. 10, 1976 (FTC itself not clear on criteria); Interview with Mark Silbergeld, Consumers Union, Feb. 7, 1977 (some aspects of criteria need clarification); Interview with Glen Nishimura and Timothy Holcomb, Arkansas Consumer Research, March 9, 1977 (need better definitions of what is acceptable as the substance of a compensation proposal, and the allowable rate of compensation); Interview with Ken Schorr, ACORN, updated (criteria not clear; no adequate statement of reasons); Letter from Anthony DiRocco, Executive Secretary, National Hearing Aid Society, to Jamie Bennett, Aug. 22, 1977, at 3 (criteria leave too much judgmental power with the FTC; reasons for some aspects of the FTC's decision unclear); Interview with Jack Hale, Connecticut Citizen Research Group, March 18, 1977 (used draft compensation guidelines, but was advised by FTC staff person to ignore guideline formula for computing costs); Interview with David Swankin, Counsel to National Consumers Congress, Feb. 11, 1977 (letter rulings on compensation requests not informative); Interview with William A. Dickert, United Consumers of the Alleghenies, March 9, 1977 (has no idea why his application for compensation was turned down).

[54] *E.g.*, Interview with Archie Richardson, Automobile Owners' Action Council, March 19, 1979; Interview with Bruce Terris, March 12, 1979; Interview with Katherine Meyer, Center for Auto Safety, March 20, 1979; Interview with Gerald Thain, Center for Public Representation, April 2, 1979; Interview with Edward Kramer, the Housing Advocates, March 28, 1979. There was one vigorous criticism of the 1977 Guidelines, to the effect that they have numerous flaws and are designed for lawyers rather than laymen. Interview with Robert Choate, Council on Children, Media and Merchandising, March 23, 1979.

[55] The "action letters" were personally signed by the Bureau Director during the early days of the compensation program. They were not collected in any central system; rather, one copy would be sent to the applicant, one would be transmitted to the public record of the rulemaking proceeding where the application had been filed, and one would be incorporated in the central compensation files maintained within the Bureau of Consumer Protection, where the action letters were intermingled with other documents relating to the particular compensation application. Collecting a set of "action letters" would have involved a substantial search, even if one had access to the Bureau files, and as described in the text the benefits in terms of additional information would not have justified the costs.

In addition to these problems of codifying and disclosing its decision-making criteria, the FTC faced both practical and conceptual questions in formulating detailed standards of eligibility for compensation. Each of the three principal factors enumerated by the statute—the applicant's interest in the proceeding, the adequacy of existing representation, and the applicant's financial inability to participate without compensation—caused some difficulties in implementation.

B. Interest in the Proceeding

The Magnuson-Moss Act's directive that compensation be given to those advocating "interests" which should, as a matter of fairness, be represented in the particular rulemaking forced the FTC to address the question of what interests would be sufficiently affected by its rulemaking proceedings to warrant funding. This proved to be no easy task.

While the concept of "interest" has analogs in the law of standing to seek judicial review[56] and in the rules of governing intervention in judicial proceedings[57] and administrative adjudications,[58] use of an interest-test in administrative rulemaking raises novel issues. Rulemaking procedures are typically designed to avoid the interest-definition question entirely, at least during the early stages of the proceeding. In the familiar notice-and-comment rulemaking procedure, for example, the agency simply opens its record and welcomes all comers who wish to submit data, views, or arguments. Participants are freed of any threshold requirement to demonstrate that they possess a legally defined right, or a particular stake in the outcome.

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[56] *E.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

[57] In the federal courts, Fed. R. Civ. P. Rule 24(a) (2) provides that anyone may intervene as of right in a civil action "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *See generally* 3B J. Moore, Federal Practice ¶24.08[2]-[6].

[58] E.g., Gellhorn at 396:

> As Professor Shapiro accurately observed [in *Some Thoughts on Intervention*

(continued)

More significant than the procedural distinctions between rulemaking and adjudication is a general difference in the kind of decision being made. In the prototypical situation where an individual tries to intervene in a court proceeding—a dispute over a common fund of money, or title to particular property—identifying the interest in question is a relatively simple matter. Substantive legal standards are already in place, and serve to single out those persons or organizations having a colorable claim of entitlement; the subject-matter of the dispute is easily definable and reducible to a common medium of exchange (a dollar value); and the outcome of the proceeding will be clear allocation of the economic goods, authoritatively defining rights and liabilities, "winners" and "losers." In a sense, the proceeding is designed to refine, elaborate and choose among interests that are already rather clearly sketched out by the applicable rules of law. Administrative rulemaking, by contrast, generally addresses the antecedent question: how shall the general standards and values be articulated to create the interests that will later be joined in particular disputes? At minimum, this latter type of proceeding is likely to affect a wider range of persons, groups and institutions, in a greater variety of ways.

The difficulty of defining interests at the outset of TRR proceedings had become fully apparent to the FTC by the time the 1977 compensation Guidelines were published:

> Most of the crucial issues . . . involve determinations of where the consumer interest really lies. Industry representatives may argue that the ultimate costs of a rule to consumers will exceed the benefits from it, or that the rule involves undesirable transfers of money or risk from one group of consumers to another. . . . [R]ulemaking proceedings often hinge on complex questions concerning whether particular practices occur with sufficient frequency to justify government

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Before Courts, Agencies and Arbitrators, 81 Harv. L.Rev. 721 (1968)], "[a]t the heart of almost every intervention case is the nature and extent of the applicant's interest in the proceeding." The intervenor's interest is significant both in determining whether exclusion is unfair to the intervenor . . . and [in determining] whether the intervenor is likely to have a separate and distinct position to present, thereby making a significant contribution to the hearing.

> action, the efficacy of proposed remedies, the scope of the practices to be covered, and their economic impact.
>
> Disputes over such issues involve complicated relationships of comon interest and conflict between different segments of industry and different types of consumers. For example, a proposed rule . . . might raise costs and prices as the price of preventing certain deceptive practices. At least three distinct consumer interests may arise in such a case: (1) those who want the protection and believe it worth the increase in price; (2) those who prefer to look out for themselves and buy more cheaply; and (3) those who would be priced out of the market completely by the increase, therefore deriving no benefit from the rule.[59]

Beyond these problematic aspects of sorting out the direct economic stakes in a proposed rule, situations may arise involving claims of indirect or noneconomic interests. Although this was not a significant problem in the FTC's compensation program during the period covered by this study, the interests asserted by some of the uncompensated participants who appeared at the hearings indicate that questions may well arise in the future. For example, the Funeral Rule's proposed ban on embalming corpses without permission of the next-of-kin drew support from representatives of religious groups which oppose embalming as an article of faith.[60] Another provision of the same rule, which would compel funeral homes to advise consumers that purchase of certain products or services is not required by law, was opposed by the U.S. Chamber of Commerce partly as a matter of general public policy, and partly because of concern that the provision would become precedent for a disclosure principle that might be broadly applied to other trades or industries at some undetermined future time.[61]

Faced with these conceptual difficulties, the FTC responded by shifting the burden to the applicants to define their own interests[62] (which they typically described as some variant of "the consumer interest")[63] and by relying heavily on the criterion of adequacy of representation, where some relatively detailed standards emerged. Thus, the definition of "interest" was only rarely of major significance in the compensation decisions that were made during the period covered by this study. However, there were some debates within the agency over the nature of the interest represented by particular applicants, and some tentative efforts to provide more precise content for the nebulous term "interest."

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[59] 42 F.R. 30482 (June 14, 1977).

[60] *See* Staff Report on Funeral Practices Rule at 187 n.l.

[61] [Add cite—DE]

[62] *See* 16 C.F.R. §1.17(c) (1) (1978) (compensation application should contain a "description of the interest the applicant has or represents in the rulemaking proceeding"); 42 F.R. 30482 (June 14, 1977) (Bureau will continue policy of funding "applications to represent consumers as a general class" but "will give preference to applicants who define their interest or point of view with greater specificity").

[63] The FTC's 1977 Guidelines for compensation observe: "To date, most applicants have claimed to represent the interests of consumers or large subgroups of consumers." 42 F.R. at 30482 (June 14, 1977).

1. Narrow-focus vs. broad-focus groups

By early 1976, the FTC's Compensation Committee had developed a clear preference for groups which had a narrow or specialized focus, as opposed to those which were general-purpose consumer advocates. The rationale for this preference seemed to be that a group with a particular well-defined interest would have a strong internal incentive to provide high-quality advocacy of its position because its constituents are more likely to monitor its activities.[64] This preference for specialized groups was carried forward into the 1977 compensation guidelines,[65] but with a somewhat different rationale. The Guidelines suggest that specialization is preferred because "the consumer interest" is composed of diverse, conflicting strands which cannot be consistently or effectively advanced by one representative[66] —a kind of "conflict of interest" theory.

One possible reason for the change in rationale is that some consumer groups which had received early drafts of the Guidelines for comment were extremely critical of the theory that a narrow organizational focus assured high quality work. Consumers Union, a broad-focus group which would quite likely be disadvantaged by the preference, argued:

> This presumption . . . is based solely upon the Bureau's *ipse dixit.* We know of no evidence which suggests that members of narrow-focus consumer organizations are more likely, or broad-focus consumer organizations less likely, to make a more thorough case or use available resources better, based upon incentives. In fact, broad-focus organizations may be viewed as such in some cases simply because they specialize in several narrow-focus issues . . . . If a more thorough case has been made or resources better used by a narrow-focus organization, the most likely explanations are 1) more experience and expertise in the substantive area, or 2) better general performance and competence. . . . The

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[64] Interview with James V. DeLong, Assistant Director, Bureau of Consumer Protection, March 10, 1976; Confidential FTC Document 6.

[65] *See* 42 F.R. 30482 (June 14, 1977).

[66] *E.g., id.*:

> [G]roups may agree on a consumer protection goal but be opposed on their assessment of the best way to attain it. An example is the conflict between those who want detailed regulation in a particular area and those who favor a free market approach . . . Again, it is difficult for one consumer representative to advocate the alternative approaches effectively.

> Bureau has already provided in the guidelines . . . for consideration of these two criteria . . . .[67]

These points seem cogent: to the extent that preference for narrow-focus groups seeks to assure a particular content or quality of presentation, other criteria can perform this task more directly and efficiently. The narrow-focus preference also may be counterintuitive or difficult for participants to understand. Well after the preference was established, there were instances in which compensation applicants argued for funding,[68] and Presiding Officers designated them as consumer representatives[69] or recommended that they be granted compensation,[70] precisely because they were broad-focus groups who could speak to a wide spectrum of consumer experience.

On the other hand, the preference for narrow-focus groups could have both theoretical and practical value for the FTC in administering the compensation program. If one starts from the assumption that a major purpose of the compensation program is to enrich the rulemaking record by encouraging advocacy of diverse and conflicting veiwpoints, then a standard which encourages the funding of specialized groups with disparate positions makes sense.[71] On a more pragmatic level, the preference could serve to disburse funds more widely among a diversity of consumer groups, rather than allowing the large, multi-purpose national groups to dominate the program. An organization like the Continental Association of Funeral and Memorial Societies, which exists solely for the purpose of facilitating low-cost, prearranged funerals, would be unlikely to apply for funds in any proceeding other than the Funeral Practices rulemaking. Preference for narrow-focus groups might also minimize the controversy which sometimes arose regarding the legitimacy or authority of compensated consumer groups to act as "representative of the consumer interest"—a role in which the procedures and participants tended to cast them, and which was challenged or resented by some uncompensated interests.[72] With a clear, specific and narrow mandate, the compensated group would more likely be viewed as a legitimate representative of a particular aspect of the consumer interest, rather than as spokesman for all consumers. The FTC's reliance on criteria which would create an incentive for quality representation might also reduce the need for agency officials to make direct assessments of the quality of the work proposed or performed by compensation applicants—a particularly sensitive and difficult task when the applicants are supposed to be independent critics of the agency.

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[67] Letter from Marck Silbergeld, Attorney, Washington office, Consumers Union, to Bonnie Naradzay, Special Assistant for Compensation, Bureau of Consumer Protection, FTC, Nov. 15, 1976, at 4.

[68] *E.g.,* Application of Consumer Federation of America for funding in Thermal Insulation proceeding, Dec. 23, 1977, at 5: "Since CFA's membership includes numerous state and local organizations in every geographic region of the country, we are uniquely suited to advocate on behalf of a widely representative cross-section of the American consuming public."

[69] Presiding Officer's Notice of Selection of Consumer Interest Group Representative in Thermal Insulation proceeding, Jan. 19, 1978, at 2:

> The California groups, that is, the California Public Interest Research Group and the California Energy Commission [,] are deemed by me to be too narrow a base to be an appropriate representative of consumer interests generally. Both of the other organizations, [the Consumer Federation of America and the National Consumers League,] on the other hand, represent national constituencies and, given the broad nature of rulemaking in general and this Rule in particular, I deem it advisable to select a Group Representative from an organization with such a broad base.

[70] Confidential FTC Document 7.

[71] It would not, however, be very helpful in choosing among groups; at the logical extreme, this approach would argue for funding as many groups as possible, so long as they took distinguishable positions with respect to the proposed rule.

2. *Groups vs. Individuals*

A related component of the interest test depended upon whether the applicant was an organization (and therefore could be presumed to represent the interests of its members and constituents) or was an unattached individual (and therefore could be presumed to speak only for personal interests). This preference for organizational applicants did not appear in either the Rules of Practice or the 1977 Guidelines, beyond the Guidelines' reference to constituency support as a factor bearing on adequacy of representation.[73] But the distinction between groups and individuals who applied for compensation in their own name during the period covered by this study, only three were given any compensation at all, and two of these received less than $300 each.[74] Most of these individual applications were

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[72] *E.g.,* Interview with Gary J. Kushner, Staff Counsel, Scientific Affairs, Grocery Manufacturers of America, Inc., Dec. 11, 1976; Interview with Howard Eglit, attorney for National Council of Senior Citizens for Chicago Hearing Aids hearings, July 5, 1976. One of the compensated consumer participants in Food Advertising, appearing on behalf of the Indiana Home Economics Association, also expressed some surprise at being "lumped together" with consumer advocate groups at the hearings, since the group's constituency, home economists, were hardly typical consumers. Interview with Mary Ruth Snyder, Indiana Home Economics Assn., March 18, 1977.

[73] *See* text accompanying notes 148-160, *infra.*

[74] The following applicants were considered as individuals for this purpose, even though in a few instances there were indications that they were affiliated with organizations that might be thought to have an interest in the proceeding. However, in their applications they did not purport to speak for the organizations.

Proceeding	Applicant(s)	Action
Care Labeling	Seymore Goldwasser	Denied
Food Advertising	Wendy Gardner	Granted
Food Advertising	Mary Ruth Nelson	Granted

filed in the first wave of postamendment TRR proceedings which went into hearing in 1975 or 1976. Later, as the correct interpretation filtered down to the operational levels of the agency,[75] individuals were presumably advised not to seek reimbursement through the compensation program, but rather to apply for funding through the Bureau's allocation of resources for staff witnesses.

While the eligibility of individual applicants to receive compensation funds was not a major practical problem for the FTC, the group preference and the related "constituency ties" factor raise some fundamental questions about the functioning of a direct funding system. Through the group preference, the FTC's Compensation Committee was evidently trying to steer a middle course between two extreme situations which could frustrate the purposes of the program. The first of these might be called "the pure entrepreneurial expert"—the grantsman who viewed the FTC compensation fund as simply another target for his proposal-writing. While no unambiguous examples of this extreme surfaced during the period covered by this study, the application filed in the Food Advertising proceeding by several faculty members at Utah State University is instructive.[76] These researchers proposed to update the data base for their computerized "Index of Nutritional Quality", and to use the index to analyze the nutrient density of traditional foods which would be covered by the proposed rule's nutrition

Proceeding	Applicant(s)	Action
Food Advertising	Kurt Oster, M.D.	Denied
Food Advertising	Sidney Margolius	Denied
Funeral Practices	Michael Hirsh	Denied
Holder in Due Course	Prof. Richard Kay	Denied
Holder in Due Course	Prof. Richard A. Hesse	Denied
Holder in Due Course	David A. Scholl	Withdrawn
Holder in Due Course	Richard Victor	Denied
Prescription Drugs	Craig Sandahl	Denied
Protein Supplements	Chester Sutton	Denied
Vocational Schools	Joel Platt	Granted
Vocational Schools	Len Vincent	Denied
Vocational Schools	John C. Hendrickson	Denied
Vocational Schools	Mary A. Vance	Withdrawn

Further information about these applications can be found in the tabular summaries in Appendix A. This list omits the "San Francisco regional office witnesses" in the Vocational Schools rule because they did not apply for compensation themselves; rather, the FTC's San Francisco regional office sought funds on their behalf. It also omits two individuals' applications on the Children's Advertising proceeding, which were pending when data collection for this study ended in early 1979.

[75] *E.g.*, Confidential FTC Document 8.

[76] Proposal to Federal Trade Commission from R. Gaurth Hansen, Bonita Wise, and Ann M. Sorenson, Utah State University, June 21, 1976.

advertising provisions. Their application reads much like the narrative portion of a conventional research grant proposal, with no reference to any interest they might represent, or to the need for representation. Although the proposal evidently was of high quality and relevant to the issues in the proceeding,[77] the question was raised as to whether the researchers represented any interest,[78] and they were not funded.[79]

At the other extreme is the compensation applicant who might be a mere "stalking horse" for the staff supporting the rule. Tactically, staff might prefer to channel some of its witnesses into the compensation program in order to make them appear more independent and impartial than they would if they were paid directly by the staff. The staff attorneys might also gain access to a larger pool of resources if they could effectively add compensation funds to the Bureau's rulemaking budget. The funds available for staff to use in hiring contract consultants for rulemaking proceedings were at times quite limited,[80] and the procedures for contracting out research were slow and cumbersome.[81] Thus, there were ample bureaucratic incentives for the staff to try to use the compensation program as an "adjunct contract fund." The officials administering the compensation program were aware of this tendency and sought to resist it, in part through application of the interest tests.[82]

To avoid the risks of either entrepreneur dominance or staff dominance of the compensation program, the requirement that the applicant must be an established, independent organization with a defined mission or interest undoubtedly has some value. However, the organization preference is a less than perfect tool to accomplish this objective. In the first place, the distinction between individuals and organizations may not always be meaningful, since an individual with a cause and a modest amount of resources can establish an organization to advocate his viewpoint. In fact, one of the compensated participants in FTC rulemaking has been described in those terms by a Ford Foundation study. The Council on Children, Media and Merchandising, which received substantial sums to participate in the Food Advertising, OTC Drugs, OTC Antacids, and Children's Advertising proceedings, was characterized as "virtually the alter ego of its founder and principal member, Robert Choate,'' who is quoted as saying: '' 'Washington is an organization town. The first question asked of one going to his or her government with other than a purely personal matter is ''who are you with?'' ' ''[83] According to the Council's application in the Food Advertising proceeding, the ''organizational base'' of CCMM consisted of 13 persons, in addition to Mr. Choate.[84]

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[77] Confidential FTC Document 9.

[78] Confidential FTC Document 10.

[79] As Appendix A indicates, no official "action letter" on this application could be found in FTC files. However, Commission records of disbursements under the compensation program make it clear that the Utah State application was not funded.

[80] Confidential FTC Document 5.

[81] Confidential FTC Document 11.

[82] Interview with Bonnie J. Naradzay, Special Assistant for Compensation, FTC, Oct. 19, 1976; Confidential FTC Document 12.

Apart from the possibility that an organization may be an ''alter ego'' of its founder or might even have been created for the purpose of conferring legitimacy and eligibility on an applicant, there is a related issue that arises when a very small organization receives a large grant for extensive participation in a major TRR proceeding. In this situation, the organization will, in all likelihood, have to subcontract most of its participation functions to persons or organizations who might not be eligible themselves for compensation— outside law firms, survey research companies, or individual experts-for-hire. An example would be the Consumer Affairs Committee of the Greater Washington Chapter, Americans for Democratic Action (ADA-CAC), which operated on an annual budget of approximately $2,000 before it became involved in trade regulation rulemaking.[85] During the three-year period from 1976-1979, ADA-CAC received compensation to participate in six different rulemaking proceedings with authorizations totalling approximately $200,000.[86] When an organization's operating budget expands so dramatically, there is some risk that it will become little more than a conduit for the funds, rather than an active participant which shapes and controls its own input into the decision-making process. In ADA's case, the organization eventually applied for, and received, funding for members of the Committee to work with outside counsel in formulating the group's position on a proposed rule.[87]

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[83] Thain & Snow, *Non-Law Public Interest Advocacy: Advertising on Children's Television,* in B. Weisbrod, J. Handler & N. Komesar, Public Interest Law: An Economic and Institutional Analysis 473, 477, 498 (paper ed. 1978).

[84] Letter from Robert B. Choate to J. Thomas Rosch, Director, Bureau of Consumer Protection, Federal Trade Commission, April 24, 1975, at 2: ''The organizational base of the Council is the ad hoc group represented by the names on this letterhead. Communication between Council members and the Chairman takes place with some regularity.'' The letterhead lists 14 members, including Mr. Choate.

[85] Application for Compensation of Consumer Affairs Committee, Greater Washington Chapter, Americans for Democratic Action, in Ophthalmic Goods Proceeding, May 27, 1976, at 3.

[86] *See* Table M, *infra.* ADA-CAC also applied unsuccessfully for funding in the Prescription Drugs rulemaking proceeding.

[87] This request arose in the joint application of ADA-CAC and the National Council of Senior Citizens for compensation in the OTC Drugs TRR proceeding. Letter from Ann Brown,

(Continued)

To the extent that these situations are regarded as potentially serious problems, a partial answer may be found in another section of the Guidelines which makes constituency ties or membership support a favorable factor in considering a group's compensation request.[88] That is, requiring the organization to demonstrate that it has active, widespread support for its activities could minimize the risk that its participation will be shaped by the FTC staff, or controlled by unrepresentative entrepreneurs. However, the intitial assumption—that the risk of dominance is a serious problem—deserves careful consideration, because it involves a variety of theoretical and practical judgments about the nature of representation in trade regulation rulemaking.

Necessity and Adequacy of Representation

1. Need for representation

The statute requires not only that an applicant for compensation possess or speak for an interest, but also that "representation of [the interest be] necessary for a fair determination of the rulemaking proceeding taken as a whole."[89] Relevant portions of the Rules of Practice simply tracked this statutory language,[90] thereby shifting the burden to the applicants in the first instance to demonstrate why representation of their interest —however they defined it—was necessary. During the early days of the compensation program, applicants sometimes simply ignored this requirement

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(Continued)
Consumer Affairs Committee, Americans for Democratic Action, and David Marlin, National Council of Senior Citizens, to Bonnie Naradzay, Special Assistant for Compensation, Nov. 18, 1977 (requesting supplemental funding for Brown and Marlin to meet with attorneys from the outside law firm representing them in the proceeding "to determine the positions which we will take on the various issues presented in this proceeding," *id.* at 6). The letter continues:

> We will of course seriously consider the advice given by our attorneys . . . but we must make the final decisions. We can only do so if representatives of each group acquaint themselves with the issues and meet with each other, our attorneys and their consultant to discuss them.

Id. at 7. The FTC's subsequent action letter approved this supplemental request, with some conditions:

> If [Ms. Brown] volunteers her time, then her time obviously does not represent a *cost* to the Committee, and it is not reimbursable . . . However, if she would otherwise not participate in this proceeding, and if the $15 per hour accrues to her, then it is reimbursable, because it is a cost to her organization.

Letter to Ann Brown and David Marlin from Richard C. Foster, Deputy Director for Operations, Bureau of Consumer Protection, Feb. 10, 1978, at 2.

[88] *See* text accompanying notes 148-160, *infra.*

[89] *See* text accompanying note 33, *supra.*

[90] 16 C.F.R. § 1.17(c) (2) (1978).

program, applicants sometimes simply ignored this requirement altogether[91] (which evidently did not preclude them from receiving compensation),[92] or provided only a cursory analysis of need.[93] More frequently, applicants resorted to arguing that "the other side" (*i.e.,* industry if the applicants were a consumer group, or vice-versa) was well funded and vigorously represented.[94] At times this approach led to quite abstract "generic balance" arguments, wholly divorced from the array of interests in the particular proceeding, as in the following example:

> It is becoming generally recognized that the consumer interest will not be automatically protected in the process of government and that special steps must be taken to assure adequate representation of that interest.
>
> . . . . .
>
> The adversary process works well only when all sides are effectively and separately represented. This would not be the case if the agency responsible for weighing the evidence and developing a final trade rule in the public interest were also the *sole* advocate of the consumer interest.[95]

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[91] *See* Application of New York Public Interest Research Group (NYPIRG) for compensation to participate in Funeral Practices proceeding, Feb. 22, 1976.

[92] As the tabular summary in Appendix A indicates, NYPIRG received a substantial grant of compensation to serve as a group representative in the Funeral Practices rulemaking and to present testimony. So far as the documentary record indicates, the question of need for representation was never raised.

[93] For example, the relevant portion of the application filed by the Golden State Mobilhome Owners League, Inc. in the Mobile Homes TRR proceeding, Oct. 20, 1976, states in its entirety:

> Mobile home consumers are not represented nationally and therefore, a grant of funds is necessary for the largest and best organized mobile home consumer group to participate in the FTC hearings. On the other hand, mobile home manufacturers and dealers are represented on a national level, and we anticipate that if mobile home consumers are not granted funds to participate in the hearings that [*sic*] only one side of the issue in regard to the FTC mobile home regulation will be presented.

This applicant was also granted compensation; *see* Appendix A.

[94] *E.g.,* Application for Compensation of Americans for Democratic Action and National Council of Senior Citizens in Funeral Practices proceeding, Feb. 23, 1976, at 5 ("Based on past experience, the Commission's informal hearing will be well attended by representatives of the funeral industry . . . It is obviously essential that consumers of funeral items and services also be adequately represented.") Application of Association of Physical Fitness Centers in the Health Spas proceeding, May 31, 1977, at 5; Application of National Hearing Aid Society in Hearing Aids proceeding, April 12, 1976, at 2-3; Application of Center for Auto Safety in Mobile Homes proceeding, Oct. 24, 1975, at 6 ("Backed by billions of dollars in sales, the mobile home industry will easily find articulate spokespersons to represent its interests. In fact, even before the TRR was published in proposed form, the Mobile Home Manufacturers Association (MHMA) petitioned the Commission to abandon the proceeding, and the industry has already deluged the TRR docket with comments highly critical of the proposed rule.").

[95] Application of Automobile Owners Action Council in Used Cars proceeding, (undated; date-stamped May 18, 1976, by Federal Trade Commission), at 11.

Other applicants emphasized the aggregate dollar stake of the interests they represented,[96] or the relevance of the information they sought to present,[97] or their expertise.[98] Only a very few attempted to make showing of need for representation based on the state of the record in the particular proceeding,[99] or the contents of compensation requests filed by other applicants[100]—which is perhaps not surprising, given the difficulty of obtaining access to these materials.[101]

In sum, during the period covered by this study, the need-for-representation standard was given a wide variety of interpretations by the compensation applicants by the FTC. At least, there is no clear evidence that any final decisions on compensation applications turned on the inadequacy of the applicant's showing of need for representation. The 1977 Guidelines continue to hedge on this point, noting that "it is difficult to define precisely when representation of an interest is 'necessary for a fair determination of the rulemaking proceedings taken as a whole.' "[102] However, the Guidelines do establish some boundaries by sketching out two situations in which the FTC believes that the test can be easily applied: "This requirement is met if the proposed rule would significantly affect the [applicant's] interest," but it "is not met when an applicant wishes a proceeding broadened to take care of its particular concerns."[103] Both of these situations deserve brief comment.

In the abstract, it is difficult to quibble with the proposition that an interest needs to be represented when a proposed government action will affect that interest in some concrete, substantial way. However, the problem here, as in the standing doctrine, is what kind of threshold determination can be made without getting deeply into the merits of the controversy. Under the Magnuson-Moss Act, one of the ultimate issues to be addressed in a TRR proceeding is the economic impact of the proposed rule, with special reference to the interests of small businessmen and consumers.[104] At the outset of a proceeding, there may be multiple versions of a proposed rule or multiple rule provisions under consideration, widely divergent beliefs as to their possible economic effects on industry or consumers, and very little relevant data available on the rulemaking record.[105] As a result, prehearing determinations of economic effect in a broad policy rulemaking proceeding must often be limited to rough estimates of economic effect, or to consideration of whether the applicant's claims of impact are plausible on their face. That is, the "significant effect" test does not seem to be a very useful tool for screening out ineligibles, or choosing among qualified funding applicants. The situation might be different if proposed rules were narrow in scope, legal theories were precisely defined, proof standards were clear, and prior stages of the process had produced a manageable set of key disputed issues. However, that would be a very different kind of proceeding from the TRR hearing observed during this study.

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[96] *E.g.*, Applications of National Consumer Law Center in Holder in Due Course proceeding (March 9, 1976, at 2-3) and Credit Practices proceeding (Feb. 26, 1976, at 2-3).

[97] *E.g.*, Application of National Consumers Congress in Food Advertising Proceeding, May 11, 1976, at 2; Application of Consumers Union in Funeral Practices proceeding, Oct. 28, 1975, at 3; Applications of Association of Physical Fitness Centers in Health Spas proceeding, May 31, 1977, at 4.

[98] *E.g.*, Application of National Consumer Law Center in Credit Practices proceeding, Feb. 26, 1976, at 3; Application of Consumers Union on Funeral Practices proceeding, Oct. 28, 1975, at 3.

[99] Application of California Citizen Action Group in Health Spas proceeding, Oct. 25, 1976, at 5-6:

> The Commission record as of October, 1976, already includes over 100 industry comments.
>
> To balance this heavy industry input, Citizen Action proposes to act as the representative of the consumer interest. Thus far, the Commission's record has very few organized consumer group comments, and of those that do exist few present an in-depth, substantive analysis of the proposed rule, and few speak from the unique perspective of Citizen Action.

[100] *See* Amended Application of Americans for Democratic Action, Health Spas proceeding, April 13, 1977, at 5–6.

[101] *See generally* the section of the Administrative Conference Report on Trade Regulation Rulemaking Procedures, Part I, relating to the rulemaking record in TRR proceedings.

[102] 42 F.R. 30482 (June 14, 1977).

[103] *Id.*

The second "need" situation, in which the Guidelines state that applications will be rejected if "the particular interest [of the applicant] is not significantly affected by the proceeding as bounded by the Commission,"[106] also seems likely to cause problems in application. This provision may have resulted from concern over the manageability of TRR proceedings under the Magnuson-Moss Act, which frequently generated enormous, unwieldy records and required serveral years to complete. With the proceedings already so large and slow, it is not surprising that the agency would be unsympathetic to any proposals to broaden the scope of a TRR.[107]

One difficulty that arises from the scope-of-proceeding test, however, is the fact that applicants' criticisms of a proposed rule will often tend to inject "new" issues that might not otherwise be in contention. After all, one basic purpose of a compensation program is to generate fresh perspectives on consumer problems. And, as discussed below, some of the criteria applied by the FTC in making compensation decisions placed a premium on new information or diverse viewpoints. Thus, applying the scope-of-proceeding tests is likely to involve some elusive distinctions. For example, it is not clear which, if any, of the following positions that might be taken by a compensation applicant would involve an interest "not significantly affected by the proceeding as bounded by the Commission":

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[104] 15 U.S.C. § 57a(d) (1) (1976).

[105] Confidential FTC Document 13.

[106] 42 F.R. 30482 (June 14, 1977).

[107] Another consideration that might make the FTC reluctant to fund groups advocating radical expansions in a proposed rule is the possibility that even if the group was successful in convincing the Commission to enlarge the scope of the TRR, industry groups may be able to convince a court to invalidate the rule on judicial review for inadequate notice.

> (a) A consumer group asserts that the rule is drafted will not protect (therefore will not affect?) the consumer interest because the remedies provided will be totally ineffective in halting abuses.
>
> (b) A trade association representing an industry covered by a proposed rule argues that the rule should be expanded to include some competitors (*e.g.*, the nonprofit competitors of proprietary vocational schools) because otherwise these competitors will have an unfair economic advantage, leading to market distortions.
>
> (c) A consumer group contends that the proposed rule, which covers deceptive practices A, B, and C, should be broadened to include deceptive practices D and E, because they are functionally similar to the covered practices or are frequently used by the same sellers.
>
> (d) A narrow-focus consumer group charges that the proposed rule is deficient because it is designed to help the average consumer, and fails to provide adequate relief ro the group's constituency of peculiarly vulnerable consumers (*e.g.*, the elderly, or children, or Spanish-speaking persons).

It seems likely that the scope-of-proceeding requirement was designed primarily to deal with the latter sort of situation, since three applications raised this problem of scope in the pre-guidelines period. Two were filed by the Council on Children, Media and Merchandising, which sought special protections for children in the Food Advertising and OTC Drugs proceedings; the third was submitted by the Spanish Speaking/Surnamed Political Association, which sought bilingual disclosure requirements in the Food Advertising rule. The Hispanic group's application was rejected on the ground that the problem of Spanish-speaking consumers "appears to apply to several rules, [and] is not a substantive, disputed issue as the food advertising proposed rule is now construed."[108] The Council on Children, Media and Merchandising, on the other hand, received funding for both of its applications, despite an initial denial in the OTC Drug proceeding based upon the irrelevance of the children's advertising issues to the proposed rule.[109] Later, the FTC commenced a separate rulemaking proceeding to

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[108] Action letter on Application of Spanish Speaking/Surnamed Political Assn., Food Advertising Proceeding, July 19, 1976, at 1.

[109] Action letter on Application of Council on Children, Media and Merchandising,OTC Drug Proceeding, March 1. 1976, at 1-2:

> Your application does not indicate in what way, if any, the interests of children bear on the question of whether claims prohibited by the FDA in labeling should be prohibited in advertising, except for the statement that "[t]he review of OTC drug labels both for wording and for efficacy of the contents of the package must be accompanied by a similar overhaul of how the products are advertised before large audiences, particularly on

deal with some general problems of advertising directed at children.[110] It is not clear how these results can be reconciled, or which of these seemingly conflicting approaches would be the correct interpretation under the Guidelines. However, the fact that CCMM received a compensation award to represent the special interests of children and illiterates in the Antacids rulemaking,[111] after the Guidelines went into effect, suggest that the FTC was not interpreting the "scope-of-proceeding" requirement very strictly.

2. *Adequacy of Representation*

Some of the most detailed standards contained in the 1977 compensation Guidelines are those explicating the statutory requirement that the applicant have, or represent, an interest "which would not otherwise be adequately represented in the proceeding."[112] In general, the factors bearing on adequacy of representation can be divided into two subgroups: those that relate to the activities which the applicant proposes to undertake, and those that involve various characteristics of attributes of the applicant. As will be seen, these two groups of standards are based upon somewhat different assumptions about the nature of interest-representation in a rulemaking proceeding.

(a) *Activity tests.*—Although the statute does not explicitly require the FTC to examine the activities which a compensation applicant proposes to undertake, this inquiry was a central feature in administration of the compensation program from the outset. The agency's reasons for emphasizing this factor are reflected in the 1977 Guidelines:

> The Bureau cannot determine that an applicant's participation is

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> television." In other words, it appears from your application that the issues you propose to raise cannot reasonably be regarded as within the scope of the issues in the rulemaking proceeding.

CCMM re-applied in a page-and-a-half letter that provided little additional explanation of its position. After reciting that the CCMM personnel involved in the proceeding felt "there is a great need to examine" the rule's theory that FDA labeling requirements can be simply extended to advertisements, the letter states:

> After discussions with your personnel I am concerned that the FTC's desire to keep these hearings to a "sharp, limited focus" disregards a number of issues about drug advertising that must be raised here and now. They may be raised again in the individual [FDA] monograph hearings relative to warnings, but they must also be raised in regard to the affirmative claims which are the subject of the immediate proceeding.

Letter from Robert B. Choate, Chairman, Council on Children, Media and Merchandising, to Margery Waxman Smith, Acting Director, BCP, Dec. 23, 1976, at 2. The application was then approved. Action letter of Jan. 21, 1977. *Cf.* Confidential FTC Documents 14-16.

[110] 43 F.R. 17967 (Apr. 27, 1978).

[111] Application of Council on Children, Media and Merchandising for Compensation in OTC Antacids Proceeding, Sept. 21, 1977; Action Letter on Application of CCMM for Compensation in OTC Antacids Proceeding, Sept. 30, 1977.

[112] 15 U.S.C. § 57a(h) (1) (A) (i) (1976).

> needed for adequate representation of the interest unless the applicant's proposed activities are compared with the efforts of the staff and other participants. . . . The adequacy clause of the statute requires that replication of material already on the record or scheduled to be put on the record does not meet the standard.[113]

This interpretation of the statute has common-sense appeal—Congress could hardly have intended that public funds be expended for the purpose of producing merely cumulative or redundant information—but it raises a series of subsidiary questions.

The first point to be noticed is that a "new information" standard does not apply equally to all compensable activities. Applicants sought, and were granted, compensation for participating in each of the major public stages of a TRR proceeding: submitting prehearing written comments, presenting testimony at the hearings, serving as a designated group representative with the right to examine and cross-examine witnesses, preparing rebuttal submissions, filing post-record comments on the Presiding Officer's and staff's final reports, and making oral presentations to the full Commission. Only three of these possible activities—prehearing comments, hearing testimony, and rebuttal submissions—are designed primarily to generate "data" as opposed to "views or argument." Even for these predominantly data-generating activities, the new information standard sometimes proved difficult to apply.

One difficulty was in determining whether mode of presentation made any difference. More specifically, if the prehearing comment record contained information of a certain kind, would this mean that compensation should be denied to an applicant who wants to present the same kind of data at the hearing? In at least some cases that arose during the period covered by this study, the answer seemed to be "yes." For example, the Center for Auto Safety and the Americans for Democratic Action filed a joint application in the Used Cars proceeding in which they proposed, among other things, to search the Center's files of some 50,000 complaints from car owners, and to prepare a report analyzing the complaints relating to used automobiles.[114] The applicants were denied funding for this portion of their proposal on the ground that it was duplicative of material already on the record.[115]

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[113] 42 F.R. 30482 (June 14, 1977).

[114] Application of Center for Auto Safety and Americans for Democratic Action, Used Cars Proceeding, Nov. 5, 1976, at 9.

[115] Action letter on compensation application of Center for Auto Safety, Dec. 21, 1976, at 2:

> As you may be aware from the staff report and subsequent written submissions on this rule, the present record contains a considerable amount of information on consumer complaints. In addition, the record shows that the Automobile Owners' Action Council has been funded to conduct the sort of file search that you have proposed. Therefore, I cannot find that this further information will be a substantial contribution rather than duplicative.

There would be little reason to object to this approach if all parts of the record were treated as being functionally equivalent in decision-making, or if there were precise standards of evidence in trade regulation rulemaking. In practice, however, neither condition existed. With respect to the relative weights of the comment record and hearing testimony, the argument could be made that written comments were entitled to less weight than oral testimony under the substantial evidence test because they had not been subjected to the crucible of cross-examination. In addition, the problems of physical access to the record—simply locating and obtaining relevant material—were often greater in the comment record, which meant that prehearing comments were more likely to get lost or overlooked in the avalanche of documents that inundated many rulemaking records.[116] The absence of clear evidentiary standards also made it difficult to determine when there was enough evidence for a particular point on the record—for example, whether there were enough consumer complaints to establish the prevalence of unfair practices covered by the rule, so that a consumer group seeking funding to generate more consumer complaints could reasonably be turned down.[117]

The second problem with the new information test concerns the ability of the FTC staff attorneys assigned to the rule to influence compensation decisions. Application of the new information standard required knowledge of both the present and the future state of the rulemaking record, since "replication of material already on the record or *scheduled to be put on the record* does not meet the standard.[118] As a practical matter, the staff attorneys have a virtual monopoly on this information. At the stage of the proceeding when compensation decisions are usually made, shortly before the start of hearings, the only other person who might have some detailed understanding of the record is the Presiding Officer. His mastery of the record in the prehearing stage is typically less systematic and detailed than staff's, since he has had neither the time nor the obligation to review all of the prehearing record, and he has not had as much contact with prospective witnesses as the staff attorneys. As a result, the staff's judgment regarding redundancy or novelty of proffered information is difficult to challenge. This fact creates some risk that the staff attorneys can use their "leverage" to compromise the independence of the compensation applicants, or to defeat the applications of disfavored groups.

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[116] *See generally* the section of the ACUS Report on Trade Regulation Rulemaking, Part I (June, 1979) relating to the rulemaking record.

[117] The passage from the Center for Auto Safety Action Letter quoted in note 115, *supra,* suggests that the earlier AOAC complaint letters were regarded as necessary evidence eligible for funding despite the presence of several thousand complaint letters on the prehearing record (Confidential FTC Document 17), but that an evidentiary line was crossed with the CFAS application. The basis for this determination is not apparent.

[118] 42 F.R. 30482 (June 14, 1977) (emphasis added).

These problems were perhaps most clearly illustrated by the handling of the Center for Auto Safety's application in the Mobile Homes proceeding. The FTC initially denied compensation for two proposed activities on redundancy grounds: an economic study was rejected because "the Commission staff proposes to introduce material that is likely adequately to explore the same economic issues," and consumer complaint testimony was refused unless the applicants could provide "additional information that will show that the witnesses will not simply duplicate the testimony of homeowner witnesses to be called by the staff."[119] The applicants responded angrily, questioning the authority of the FTC to dictate the content of a compensated group's presentation, and requesting discovery of the staff's "case" so that they could dispute the claim of duplication:

> [The compensation provision] was not intended to provide Commission staff an opportunity to control the participation of outside counsel and witnesses, or to use those [who are] granted compensation merely to fill in what Commission staff regard as gaps in the rulemaking record. On the contrary, as Congress recognized, adequate representation is possible only when the client and his/her representatives - and not the FTC - determine what submissions are necessary to support the client's position. . . .
>
> . . . [S]ince we do not know either what testimony staff mobile homeowner witnesses will present or what material the staff will introduce that is "likely to explore" the economic issues we have raised, we cannot now demonstrate that our witnesses and economic study will [provide new information] . . . . Indeed, given this information vacuum, we do not see how *anyone* would make the showing you require. We therefore request that the Commission specify (1) the testimony staff homeowner witnesses will present and (2) the economic material the staff will present.[120]

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[119] Action letter on application of Center for Auto Safety, Jan. 19, 1976, at 2.

[120] Letter from Clarence M. Ditlow, III and Michael M. Landa, Center for Auto Safety, to Joan Z. Bernstein, Acting Director, Bureau of Consumer Protection, Federal Trade Commission, Feb. 26, 1976, at 2. The level of detail (and the burden to FTC staff) that would be encompassed in this discovery request is suggested by the Center's specifications on the economic issue, on which the following information was sought:

(1) How consumer effects are to be defined and measured;
(2) Whether the question of impact of the rule on concentration of market power will be addressed, [and] if so how it will be handled;
(3) How the costs and benefits of the rule will be defined and measured;
(4) What other specific economic issues the staff will raise, the nature of the economic models to be used in all cases in structuring the analysis, the data to be employed.

Id. at 2-3. To the extent these specifications would require the FTC to take a position on unresolved questions of evidentiary standards or burden of proof, there was an additional incentive to avoid a confrontation.

This particular controversy was resolved through informal negotiations between the applicant and the staff,[121] but it does illustrate the dilemmas of applying a new information standard. If the test is to be anything more than a coarse-grained filter for the grossest redundancies, it will be necessary to receive detailed recommendations from the only individuals who are thoroughly knowledgeable, the staff attorneys. Allowing the staff's characterization to pass without effective opportunity for outside challenge could pose a real threat to the independence of the consumer and industry groups who apply for compensation: simply by making a plausible assertion that the information in question was redundant, the staff could defeat a disfavored applicant. On the other hand, implementing a realistic right to contest the staff recommendation would complicate and delay the proceedings,[122] and would also require public disclosure of intra-agency memoranda containing advice or recommendations—something the FTC is not willing to do.[123]

(b) *Group representatives.*—Although the legislative history of the Magnuson-Moss Act suggests that the opportunity to cross-examine at TRR hearings was provided as a means of protecting those who would be regulated by a proposed rule, the first wave of compensation applications under the statue made it clear that consumer groups also wanted to take advantage of this new procedural right. When the issue arose for the first time in the Vocational Schools proceedings, the FTC decided that the language of the statute was broad enough to permit funding of applicants who wanted to serve as a group representative,[124] and authorization for "procedural participation" soon became a regular feature of the compensation program.[125] In fact, the presumption in favor of having consumer group representatives present at all hearings became so well established that staff and Presiding Officers occasionally solicited consumer groups to apply for compensation when no one had volunteered to serve as consumer spokesman at the hearing.[126] At least one consumer representative was present at virtually all of the hearings in 13 of the first 14 TRR proceedings conducted under the Magnuson-Moss Act.[127]

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[121] Letter from Joan Z. Bernstein, Acting Director, Bureau of Consumer Protection, to Clarence M. Ditlow, III and Michael M. Landa, April 12, 1976.

[122] The major problems would be threefold. First, the challenger would have to be given time and opportunity to master the existing record—no small chore, given the size and disorganization of the records and the fact that only a single copy was kept in Washington. Second, the challengers would have to have some opportunity to discover staff's projections of what was scheduled or likely to be introduced at the hearing, which would divert staff from hearing preparation and probably intensify the discovery problems that arose in other aspects of the TRR proceedings. Finally, such a procedure would require more time and effort on the part of FTC officials who are responsible for making compensation decisions. In addition, if an applicant group was truly lacking in resources it might need compensation in order to mount a meaningful challenge to the denial of compensation.

[123] Interview with Michael Sohn, General Counsel, and Barry Rubin, Office of General Counsel, Federal Trade Commission, Jan. 8, 1979.

[124] Confidential FTC Documents 18-20; Action letter on Application of San Francisco Consumer Action in Vocational Schools proceeding, Oct. 24, 1975.

[125] *See* 1977 Compensation Guidelines, 42 F.R. 30481 (June 14, 1977) (funding available for "participating as a party in the informal hearing, with a right to examine or cross-examine witnesses as allowed by the Presiding Officer").

Once the principle was established that procedural participation could be compensated, the question arose as to whether there should be a presumption in favor of funding different local groups to represent the consumer interest at each of the regional hearings on a particular rule, or of funding one group to participate in all of the hearings. In the early Magnuson-Moss proceedings, most of the consumer group applicants did not request funding to serve as a group representative at more than one or two regional hearings. Soon, however, it became clear that there were some significant disadvantages in having a different consumer representative at each regional hearing. From the Presiding Officer's prespective, it was preferable to have one group maintain continuity throughout the proceeding: the single representative would be familiar with the procedural ground rules of the hearing, and would be less likely to duplicate points that had been established at earlier hearings sites.[128] Similarly, as consumer group lawyers gained experience in Magnuson-Moss rulemaking, they began to realize that the group representative who entered in the middle or late stages of an ongoing proceeding was laboring under a handicap, and that fragmented consumer representation was ineffective.[129]

In their funding applications, some consumer groups began to seek compensation to represent the consumer interest at all stages of the proceeding, and to argue the case for having at least one spokesman maintain continuity throughout a rulemaking:

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[126] Interview with Kathleen O'Reilly, Consumer Federation of America, Feb. 16, 1977; Interview with James Turner, counsel for Consumer Action, Inc. in Food Advertising rule, Aug. 16, 1976.

[127] *See* Data Appendix to Part I of the Administrative Conference Report on Trade Regulation Rulemaking (Data Book I), item 22. The exception was the Protein Supplements proceeding, and in that hearing a consumer group representative was present in the audience and submitting written questions for the Presiding Officer to ask during at least part of the hearings. Interview with Margaret Godwyn, San Francisco Consumer Action, Nov. 8, 1976.

[128] Interview with William D. Dixon, Special Assistant for Rulemaking, BCP, Feb. 7, 1976.

[129] Interview with Lonnie Von Renner, counsel to Americans for Democratic Action in Prescription Drugs, Funeral Practices and Ophthalmic Goods proceedings, Feb. 15, 1977; Interview with John Pound, Kenneth McEldowney & Karen Tomovick, San Francisco Consumer Action, Dec. 12, 1975; Interview with Michael Schulman and John Reed, California Citizen Action Group, July 30, 1976; Interview with David Swankin, counsel for National Consumer Congress in Care Labeling proceeding and Continental Association of Funeral and Memorial Societies in Funeral Practices proceeding, Nov. 23, 1976; Interview with James Turner, counsel for D.C. Consumer Action, Food Advertising proceeding, Dec. 2, 1976.

> [Funding different consumer representatives in different cities] severely interferes with effective cross-examination since material adduced at earlier hearings cannot be used as the basis of questions. It also prevents the use of cross-examination or direct testimony to fill . . . gaps in the record since consumer attorneys cannot know what gaps exist. Similarly, it is impossible for consumer attorneys to prepare effective rebuttal since they do not know what evidence needs to be rebutted . . . .
>
> Perhaps most important, there is no way for consumer attorneys to prepare adequate [post-hearing] written comments [on the Presiding Officer's and staff's reports] without being familiar with the entire record. If consumer attorneys have not participated at all the hearings, they will have to read a voluminous record later. This is wasteful in both time and money . . . .
>
> . . . No industry organization would consider itself adequately represented if it did not have the same counsel participate throughout the proceeding - planning a strategy before the hearings begin; obtaining witnesses to support this position; having counsel cross-examine witnesses at all the hearings; preparing rebuttal to respond to important adverse evidence; and drafting detailed written comments which use the entire record to present forcefully the group's entire case.[130]

Based on hearing observations and other data collected in this study, the foregoing description of the proceedings is fairly accurate. Uncompensated group representatives generally did structure their participation to develop evidence and arguments in support of their "case" throughout the series of hearings, rather than treating each hearing as having a distinct regional focus. It also seemed generally true that effective participation in the later stages of the proceeding required detailed knowledge of what had gone on before. However, consumer group spokesmen interviewed in this study were not unanimous in their support for the single representative notion, and does seem clear that there may be negative aspects of a policy favoring the funding of only one consumer representative.

Some consumer spokesmen take the position that it is preferable to fund diverse local groups in order to support more "grassroots" input into rulemaking.[131] They point out that some of the smaller local and regional groups may not be willing or able to take on the responsibility for acting as a group representative throughout a long and complex proceeding.[132] It does seem likely that a *de facto* policy[133] of funding at least one consumer representative throughout each TRR hearing will lead to a smaller number of funded participants, and more concentration of the representation function in a specialized "Consumer FTC bar." It may also lead to conflict among consumer groups if they begin competing with each other for the right to be the consumer representative.[134] Consumer group officials have suggested that there are intermediate positions. For example, the Commission could maintain the earlier practice of funding different consumer representatives for different stages of the process, but give them enough resources so they could meet periodically to develop a common strategy.[135]

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[130] Joint application of Center for Auto Safety and Americans for Democratic Action, Used Cars proceeding, Nov. 5, 1976, at 6.

[131] Interview with Margaret Godwyn, San Francisco Consumer Action, Nov. 8, 1976; Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Oct. 26, 1976. Some FTC officials involved in the compensation program disagree; they feel that the prehearing comment records and hearing testimony are adequate to give the Commission an understanding of "grassroots" sentiment in TRR proceedings, and that what is really needed for effective representation of the consumer interest is adequate technical expertise, including legal skills. Interview with Michael Sohn, General Counsel, and Barry Rubin, Office of General Counsel, Jan. 8, 1979.

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[132] Interview with Margaret Godwyn, San Francisco Consumer Action, Nov. 8, 1976 (consumer groups have limited staffs, may be over-extended if they try to serve as consumer representative at all hearings); Interview with Mark Silbergeld, Consumers Union, Feb. 7, 1977 (not all consumer groups could afford preparation and consultation time to provide a lawyer for all hearings); Interview with John Pound, San Francisco Consumer Action, Sept. 2, 1976 (community groups lack resources to participate on an equal footing with industry and FTC staff, but involvement of community groups in the administrative process is beneficial); Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Oct. 26, 1976 (not always possible for a group to be available for all hearings).

To some extent, the FTC's recent policy of cutting back on the number of regional hearings will alleviate these problems. Sohn-Rubin Interview, *supra* note 131. However, TRR proceedings will in all likelihood still be lengthy and complicated affairs, and therefore may be more than many groups are willing or able to undertake on more than a limited basis.

[133] Sohn-Rubin Interview, *supra* note 131.

[134] Some indication of this can be found in the Children's Advertising proceeding. There, one consumer group sent a letter to the FTC's Special Assistant for Public Participation, with copies to the Bureau Director and Commission chairman, urging that compensation funds not be disbursed too widely among consumer groups:

> It is our understanding that a number of groups are being encouraged to apply for reimbursement in this proceeding. Since there is undoubtedly a limited amount of money available, we are concerned that, if the money is divided among a large number of groups, no one group will be able to participate fully throughout the [proceeding].
>
> We simply hope that no prejudgment has been made by the FTC on how to divide the money . . .

Letter from Peggy Charren, Action for Children's Television, to Bonnie Naradzay, Special Assistant for Public Participation, FTC, March 22, 1978. Soon thereafter, a competing consumer group filed a Fredom of Information Act request for this correspondence. Letter from Harry Snyder, Consumers Union, West Coast Office, to Barbara Keehn, Freedom of Information Unit, FTC, April 4, 1978.

[135] Interview with Michael Schulman and John Reed, California Citizen Action Group, July 30, 1976. A similar technique would be compensating regional representatives to attend and observe earlier hearings (Supplemental application of Golden State Mobilhome Owners League, Inc. for $1843.00 to have attorney observe Washington, D.C. hearings, in Mobile Homes proceeding, June 7, 1977; FTC action letter of July 13, 1978, grants $500 for purchase of transcript of Washington hearings instead). Depending upon the size of the hearing and the number of participants involved, these approaches could increase the costs of the compensation program markedly. One suggestion to offset these increased costs is to fund consumer representation only in major controversial proceedings. Interview with David Swankin, counsel for National Consumers Congress in Care Labeling proceeding, February 11, 1977.

Alternatively, the "lead" consumer group representative could be encouraged or required to remain in contact with smaller regional or local groups, and to represent their interests at the hearings.[136] These alternatives seem likely to be relatively costly and cumbersome, however, and likely to increase the proportion of the compensation fund spend on lawyers' fees. In this area, the FTC seems to face an inescapable tradeoff between making consumer participation broadly representative, and making it technically competent.[137] By accepting the arguments of the consumer groups for unified representation, the agency has given preeminence to the objective of providing technically effective, expert representation.

The propriety of procedural representation seemed largely settled until the Commission began experimenting with modified procedures in the Children's Advertising proceeding. There, the FTC adopted a two-stage hearing format.[138] The first stage was a purely legislative hearing, with no opportunity for cross-examination; interested persons were allowed to submit proposed questions to the Presiding Officer, but he had discretion as to whether and how the questions would be asked. Following the legislative hearing, interested persons could propose disputed issues to be explored in a second hearing through cross-examination. Despite the absence of an opportunity to cross-examine in the legislative hearings, several groups applied for funding to act as procedural representatives during that phase of the process. Their arguments were basically twofold. First, transcript reading was not adequate substitute for attendance at the hearing.[139] The purpose of the compensation program was "to give [citizen] groups essentially the same kind of effective representation as that of industry and the staff," and "no competent lawyer would suggest that representation has been effective if a party is not even represented at the legislative hearings."[140] Second, denying funds for this purpose would not really save money and might cost time. Compensated consumer groups would have to become familiar with the whole record at the later stages of the process, and purchasing transcripts and compensating the groups' lawyers to read them could be almost as costly. Moreover, given the length of transcripts, it might not be possible for the compensated groups to complete their review within the 30 days allowed for proposing disputed issues. These arguments prevailed, and the FTC funded several consumer groups for representation at the legislative hearings; however, compensation was limited to one person per group.[141]

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[136] Interview with James Turner, counsel to D.C. Consumer Action, Food Advertising proceeding, December 2, 1976.

[137] For a fuller discussion of the distinction between "grassroots" interest-representation and technical proficiency, *see* text accompanying notes 161-179, *infra.*

[138] *See generally* 43 F.R. 17967 (April 27, 1978).

[139] Revised application of Action for Children's Television and Center for Science in the Public Interest in Children's Advertising Proceeding, October 25, 1978, at 6:

> [Attendance at the legislative hearing] will allow representatives of ACT and CSPI to hear the answers given by witnesses to their questions and then to ask follow up questions of witnesses through the Presiding Officer. Unless ACT and CSPI can ask such follow-up questions, they will have been denied effective participation in the legislative hearings.
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> . . . [In order to decide what issues should be proposed for the second hearing,] it is important to hear the questions asked by the Presiding Officer and the answers given to get a sense of the importance of various positions. Second, the demeanor of witnesses is important in order to determine which witnesses should be cross-examined at a later hearing and which should be rebutted . . . .

[140] *Id.* at 7.

Since the "new information" test does not apply easily, if at all, to procedural representation the hearing and post-hearing stages, other criteria must be applied when applications propose this kind of activity. The only portion of the 1977 Guidelines which speaks directly to this issue is the provision which states: "Evidence that the applicant has a point of view, not already represented by the FTC staff attorneys or any other party, that would help illuminate [key] issues can be [a] favorable [factor]."[142] The documentary records of the compensation program provide no real indication of how the "unique point of view" test was applied; presumably it would involve at least a showing that the applicant favors an outcome different from those supported by staff, industry, or other applicants.[143] In practice, decisions on request for funding to engage in procedural representation seemed to depend more heavily on factors relating to the status of the applicant.

(c) *Status tests.*—The 1977 Guidelines contain six factors which relate to the characteristics or status of the applicant. Functionally, these tests can be divided into two classes: those which concern the representativeness of the group which is applying, and those which touch upon the applicant's technical competence. Both types of criteria seem designed to assure quality of participation. That is, they are directed not at determining whether the existing participants adequately represent the applicant's interest, but rather at predicting whether the applicant, if compensated, will make a substantial contribution to providing adequate representation for the interest in question.[144]

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[141] *See* Appendix A.

[142] 42 F.R. 30482 (June 14, 1977).

[143] One law professor applicant in the Holder in Due Course amendment proceeding addressed the point by saying: "I am not aware of any other individual who shares exactly my views on this subject. Therefore, these views could not be adequately otherwise represented." Application of Professor Richard S. Kay, Feb. 26, 1976 Compensation was denied on the ground that the applicant's "participation would be more in the nature of that of an expert witness rather than as a representative of an interest." Action letter of March 30, 1976.

[144] The FTC's reasoning is set forth as follows in the Guidelines:

> [T]he statutory requirement that without the particular applicant the interest will not be adequately represented means that the quality of an application is relevant. The Bureau must determine that it is reasonably likely that the applicant can competently represent its interest.
>
> . . . The test is not whether a particular applicant will make representation of an interest fully adequate, but whether the representation will make a substantial contribution to the adequacy of representation.

42 F.R. 30482 (June 14, 1977).

The Guidelines acknowledge three types of competence or experience as favorable factors in the evaluation of a compensation applicant: expertise in the substantive area covered by the proposed rule, experience in trade regulation matters, and general performance and competence in areas other than trade regulation.[145] There was no significant problem or controversy involved in the application of these criteria during the period covered by the study, and no doubt they are reasonable factors to consider in estimating the utility of a group's participation. However, it should be noted that emphasis on demonstrated expertise, particularly in FTC issues, may tend to create a preference for "repeat player" groups which have previously received funding. Such a group would have several advantages over an inexperienced applicant: a successful grant application format that could be copied in later applications, a reputation within the agency for competence, and the precedential effect resulting from a previous determination that the applicant met the status tests. On occasion, both FTC personnel and applicants suggested that a prior grant of compensation meant that any questions regarding the applicant's status or characteristics had already been resolved, and need not be re-examined.[146] This precedential effect could apply not only to applicant competence, but also to interest definition, representativeness, and possibly also to point of view and need for financial assistance. It is not possible to quantify or demonstrate the extent to which prior compensation grants may have affected decisions or pending applications, but it is worth noting that organizations which applied in several proceedings had a very high success rate unless they had turned in a notably weak performance in their first attempt.[147] In light of the vagueness of some

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[145] *Id.* The Guidelines further note, with regard to general performance and competence: "An applicant requesting funds to perform survey research should prove its competence in conducting surveys, or in knowing whom to hire for survey work. A request for funds for cross-examination should establish the expertise of the proposed cross-examiner."

[146] *E.g.,* Application of California Citizen Action Group in Health Spas proceeding, Oct. 25, 1976, at 8 ("In regard to the question of financial assistance, it should be noted that on three previous occasions, the FTC determined that Citizen Action could not effectively participate without financial assistance . . . "); Confidential FTC Document 21.

[147] *See* Appendix I, Frequency of Application and Authorization. That table indicates that the ten groups which applied in three or more proceedings were successful in 35 of 42 applications, an 83 percent success rate. This figure may underestimate the true success rate. Three of the unsuccessful applications came in the Prescription Drugs proceeding, one of the earliest rulemakings under the Magnuson-Moss Act. The denials were based on the "new information" standard, which had not yet been made clear to applicants. Action Letter on application of San Francisco Consumer Action, November 24, 1975; Action Letter on application of Consumer Affairs Commttee, Americans for Democratic Action, November 24, 1975; Action Letter on application of Consumers Union, November 24, 1975. In addition, one other "unsuccessful" application was withdrawn by the applicant before an FTC decision. Finally, the California Public Interest Group applications may represent a situation where an applicant established a negative precedent in its first application. CalPIRG was granted $46,000 to

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of the criteria and the workload pressures on the officials administering the compensation program, this reluctance to reopen issues that had previously been considered is understandable, and probably efficient as well.

The second major cluster of status tests deals with the relationship between the applicant and the interest it purports to represent. Under the Guidelines, the applicant must be a bona fide spokesman for the interest in question,[148] and the applicant's status as a membership organization or the recipient of contributions from its constituency are favorable factors.[149] Similarly, the applicant's willingness to spend some of its own money on the proceeding is considered a positive factor.[150]

This emphasis on constituency ties may serve two rather different objectives. If the group is accountable to its membership or contributors, it may be under pressure to produce results and therefore do quality work. The existence of a defined constituency may also have a legitimizing function: to the extent that major questions in trade regulation rulemaking

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participate in the Used Cars proceeding. Its lead researcher wrote a letter and testimony and describing internal dissension in the group. Letter from David Rogoff to Bonnie Naradzay, March 19, 1977; *cf.* Letter from Miles Frieden, Executive Co-Director, CalPIRG, to James P. Greenan, Presiding Office May 16, 1977. CalPIRG's applications in two later proceedings were denied. One of the officials administering the program had commented during the Used Cars controversy:

> [I]t would be a mistake for anyone to regard this [compensation] program as a general subsidy that will continue regardless of the quality of work. While we have been liberal in allowing groups to show what they can do, there is an institutional memory here and certainly any group applying for compensation a second time had better have excellent explanations for any failures of performance in prior situations.

Letter from James V. DeLong, Assistant Director, BCP, to David Rogoff April 22, 1977, at 4.

[148] 42 F.R. at 30482. The Guidelines explain: "An industry trade association that claims to represent consumers would be viewed skeptically, and vice versa, for example." *Id.*

[149] *Id. See also* Health Research Group v. Kennedy, 45 Ad. L. 2d 133 (D.D.C. 1979), where the court denied standing to seek judicial review to a Nader-affiliate organization which had no members, just contributors. In reaching this decision, the court reasoned:

> So long as the courts insist on some sort of substantial nexus between the injured party and the organizational plantiff — a nexus normally to be provided by actual membership or its functional equivalent, measured in terms of control — it can reasonably be presumed that, in effect, it *is* the injured party who is himself seeking review. . . .
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> . . . . .
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> . . . [T]here is a material difference of both degree and substance between the control exercised by masses of *contributors* tending to give more or less money to an organization depending on its responsiveness to their interests, or through the expression of opinion in the letters of *supporters,* on the one hand, and the control exercised by *members* of an organization as they regularly elect their governing body on the other.

Id. at 140, 141 [emphasis in original].

[150] 42 F.R. at 30482.

involve value preferences as to whether additional protections for the consumer are worth the cost, it may be desirable or necessary to assure that the group actually has some authority to speak on behalf of its constituents.[150A]

These justifications, however, are subject to both practical and theoretical objections. As a factual matter, it is doubtful that the rank-and-file members of consumer organizations (or, for that matter, trade and professional associations and other voluntary groups) actually participate to any significant degree in the initial decision to participate in this kind of proceeding, or in monitoring the quality of representation. The practical obstacles are formidable, both because the issues raised in deciding whether or how to participate in a TRR proceeding are complex, and because the time and resource costs of polling a dispersed membership can be prohibitive. Also, the members are not likely to have access to detailed information about the proceedings and the conduct of the group's representatives, except through the association and its publications. Available evidence, both from this study and from the literature on related areas of public participation,[151] suggests that the level of member involvement is very low. Members will usually have expectations about the basic objectives the organization will pursue and its general level of success in realizing those objectives. Decisions about the positions, strategies and tactics to be adopted in a particular controversy tend to be made by the staff of the organization, or by staff in conjunction with boards of directors or executive committees, or by the lawyers and other technicians who are developing the strategy and tactics of participation. That is, membership influence, to the extent it exists, comes more from the choice between "exit" and "loyalty" than from opportunities for "voice" within the organization,[152] and this sort of evidence can be ambiguous at best.[153]

[150A] Documentary records and interviews with FTC officials suggest that, in practice, the "quality control" aspect was the dominant consideration, and the legitimizing aspect received little or no attenion from agency decision-makers.

[151] *See, e.g.*, T. Lowi, The Politics of Disorder (paper ed. 1974); J. Berry, Lobbying For The People (paper ed. 1977); C. Pateman, Participation and Democratic Theory (paper ed. 1977); S. Ebbin and R. Kasper, Citizen Groups and the Nuclear Power Controversy: Uses or Scientific and Technical Information (paper ed. 1974).

[152] One consumer group spokesman interviewed during this study felt that opinions expressed in constituents' letters were a more reliable form of "feedback" for the organization. Interview with Robert Choate, Council on Children, Media and Merchandising, March 26, 1979. The group in question is a non-membership organization.

[153] Members may join, or leave, an organization for a great variety of reasons, some of them totally unrelated to the group's position on particular issues. Even if one assumes that an organization's participation in a given proceeding is sufficiently important to influence membership decisions, the proper interpretation of a rise or fall in membership may be arguable. The compensation application of the National Hearing Aid Society (NHAS), a membership association of hearing aid dealers, illustrates this problem. The Society argued

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Compensated consumer groups contacted during the course of this study indicated that they used a variety of strategies to develop and validate the positions that they were taking on pending TRR's. Some groups held meetings with individual consumers who would be affected by the rule,[154] or discussed the issues with other consumer organizations.[155] Others conducted informal surveys of consumer opinion about particular rule provisions,[156] or kept their positions tentative pending completion of research they were conducting in the proceeding.[157] A number of groups required staff members who were working on TRR's to get approval from a Board of Directors,[158] or would not adopt a position unless consensus could be

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that it should be granted funding to continue its participation in the Hearing Aids rulemaking because it had taxed its membership of small businessmen to the limit, and had fallen short of raising the money it needed to pay its lawyers. As evidence of its financial inability to participate, NHAS pointed out that its dues had nearly tripled over a three-year period, and that several hundred members had refused to pay these increased dues, or a special assessment to support participation. Application of National Hearing Aid Society, May 4, 1976, at 1-2. However, a rival association argued that "the acknowledged drop in NHAS membership . . . may be a product of dealer dissatisfaction with the direction and substance of NHAS advocacy efforts, and not, as NHAS suggests, the result of increased NHAS membership dues." Letter from American Speech and Hearing Association to Presiding Officer, May 21, 1976, at 1.

[154] Interview with Edward Kramer, The Housing Advocates, Mobile Homes proceeding, March 28, 1979.

[155] Interview with Miles Frieden, CalPIRG, Used Cars proceeding, April 3, 1979.

[156] Interview with Irmgard Hunt, Consumer Action Now's Council for Environmental Alternatives, Protein Supplements proceeding, April 3, 1979.

[157] Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Funeral Practices Proceeding, October 26, 1976 (proposed to hire an economist to investigate whether the disclosures mandated by the Funeral Rule would raise prices to the consumer, as industry claimed); Interview with Lonnie Von Renner, counsel to Americans for Democratic Action and National Council of Senior Citizens in Prescription Drugs, Funeral Practices and Ophthalmic Goods proceedings, February 15, 1977 (when there is evidence that consumer interests are not uniform, the group's position should be flexible to accomodate evidence offered at the hearing; taking a firm position can be delayed until the post-hearing comment stage of the proceedings); Interview with Jack Hale, Connecticut Citizen Research Group, Food Advertising Proceeding, March 18, 1977 (formulating a position on the rule caused some problems of identifying and accomodating subgroups of consumers, especially when objective data were not available).

[158] Interview with Glen Nishimura and Timothy Holcomb, Arkansas Consumer Research, Funeral Practices proceeding, March 9, 1977; Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Socieiteis, Funeral Practices Proceeding, October 26, 1976 (decision to participate made by Board of Directors on recommendation of staff; board elected by members of local memorial societies); Interview with Gerald Thain, Center for Public Representation, Used Cars, Thermal Insulation and Children's Advertising proceedings, April 5, 1979.

achieved among staff members.[159] In a few groups, the question did not arise because the organization had already taken a position on the issues before becoming involved in the TRR proceeding.[160] To determine what significance, if any, these varying relationships between public interest groups and their constituencies should have in FTC compensation decisions, it is necessary to consider briefly some theoretical aspects of the representative relationship.

3. *Adequacy of Representation: Theoretical Considerations*

As the foregoing discussion suggests, the FTC's interest representation standards were fairly vague, and some of the tests developed in the Guidelines seemed to pull in opposite directions. In large measure, the difficulty may arise not so much from deficiencies in implementation as from the lack of any clear theory of representation that could give focus and coherence to the compensation program. Despite its familiarity and frequent use in discussions of public participation, the concept of representation—whether of persons or interests—is complex and variable from one context to another. For present purposes, it seems useful to consider two dimensions of the concept of representation in relation to the FTC compensation program: the functional and the formalistic aspects of the representative's status.

Functional considerations, as used here, refer to the relationship between the characteristics and activities of the representative, and the kinds of decisions being made. One commentary on political representation states this relationship in the following terms:

> The more a theorist sees political issues as questions of knowledge, to which it is possible to find correct, objectively valid answers, the more inclined he will be to regard the representative as an expert and to find the opinion of a constituency irrelevant. If political issues are like scientific or even mathematical problems, it is foolish to try to solve them by counting noses in the constituency. On the other hand, the more a theorist takes political issues to be arbitrary and irrational choices, matters of whim or taste, the less it makes sense for a representative to . . . ignor[e] the tastes of those for whom he is supposed to be acting. If political choices are like the choice between, say, two kinds of food, the representative can only please either his own taste or theirs, and the latter seems the only justifiable choice. . . .

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[159] Interview with Margaret Godwyn, San Francisco Consumer Action (Protein Supplements Rule), November 8, 1976 (all policy decisions presented to group staff for debate and vote; policy decisions required consensus rather than a majority vote; policy decisions required consensus rather than a majority vote); Interview with Mark Silbergeld, Staff Attorney, Consumers Union, February 7, 1977 (position arrived at collegially, by discussions between staff lawyers and technical experts).

[160] Interview with Robert Choate, *supra* note 152.

> . . . Political issues, by and large, are found in the intermediate range . . . . Political questions are not likely to be as arbitrary as a choice between two foods; nor are they likely to be questions of knowledge to which an expert can supply the one correct answer.[161]

Regulatory decisions, including those involved in trade regulation rulemaking, can also be ranked on a continuum that ranges from the normative to the expert, and the location of a particular decision on the continuum implies the kind of representation which is appropriate. That is, when the decision is predominantly technical or scientific, the representative should be an expert in the relevant discipline. If, on the other hand, the decision is intended to produce a bargained outcome or a "pure" policy choice, the representative's influence should depend largely on the constituency he purports to represent.

The conceptual difficulty confronting the Federal Trade Commission, as some agency officials have realized,[162] is that most of the issues raised in trade regulation rulemaking do not fall at either extreme on this continuum. A few proceedings will include relative narrow technical inquiries, such as the question in the Protein Supplements proceeding regarding the processes by which human beings metabolize amino acids.[163] Somewhat more frequently, TRR proceedings will raise what may be considered a pure policy question. An example can be found in the Credit Practices proceeding: if one assumes economic theory is correct when it predicts that abolition of summary creditors' remedies will raise the cost of credit, or reduce the availability of credit for low income consumers, or both, what regulatory policy should be adopted?[164] Between these extremes lie the great majority of issues in trade regulation rulemaking, mixing normative and expert considerations. For these middle-range questions, the "political" or "technical" character of a particular issue is in large measure a matter of discretion or choice. One could, for example, convert the policy question concerning creditors' remedies described above into the factural issue of whether the projected economic effects and other possible costs or benefits will in fact occur, and then try to resolve these issues through field research on the behavior or attitudes of lenders and borrowers, comparisons of experience in states which had abolished summary remedies with those which had not, and so on. The rulemaking process also takes place within a larger political context. Thus, even if the agency views its decision on a proposed rule as a purely technical matter, it may still have to be concerned about generating enough political support to enable its final product to survive congressional oversight.

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[161] H. Pitkin, The Concept of Representation 211-12 (paper ed. 1972).

[162] *E.g.,* Letter from James V. DeLong, Assistant Director, BCP, to David Rogoff, April 22, 1977, at 1-2.

> [I]t must be recognized that the public participation program, like rulemaking proceedings themselves, has two aspects that do not always mesh smoothly. On the one hand it is a technical inquiry into what is going on in a particular industry and what steps may be taken by the Federal Trade Commission to alleviate consumer injury. This aspect requires legal analysis of deception and unfairness, surveys into the prevalence of practices, economic analysis of harm . . . and so on. The other aspect is that a rulemaking proceeding often has a large component of participatory democracy in it. . . . Technical studies, for example, cannot substitute for the direct experience of consumers who have dealt with the used car sales system. . . . Nor can technical studies substitute for asking consumers and consumer groups directly whether they feel a need for it.
>
> In administrating [*sic*] the compensation program we have tried to recognize both these dimensions.

See also Statement of Margery Waxman Smith, Acting Director, Bureau of Consumer Protection, FTC, in Hearings on H.R. 3361 Before the Subcomm. on Admin. Law and Governmental Relations of the Senate Judiciary Comm., 95th Cong., 1st Sess. 517-18 (1977).

[163] Report of the Presiding Oficer, Protein Supplements Proceeding 14-30 (June 15,1978).

[164] *See* 40 F.R. 16349 (Apr. 11, 1975).

In light of the mixed and shifting character of the issues involved in FTC rulemaking, it seems impossible to develop simple, uniform standards which reconcile the conflicting bases of representation outlined above. But in theory, at least, it might be desirable to apply the representation tests so that they give appropriate emphasis to the kinds of presentation the applicant proposes to make. That is, if the applicant seeks to develop technical information such as survey research data or economic modeling, its expertise would become a predominant concern. If, on the other hand, the applicant wishes to address policy or value or preference issues, its ability to speak for an affected constituency would be the key factor. The 1977 compensation Guidelines are generally consistent with this approach, although some clarification and elaboration might be helpful.

Whenever a compensation applicant's proposed participation has a sufficiently large policy or value-preference component to raise questions about the organization's ability to speak on the behalf of a constituency, it becomes necessary to inquire into the formalistic aspects of the representative relationship. That is, the agency should consider whether there is an adequate mechanism to assure that the applicant is a proper, legitimate spokesman for the interest it purports to represent.[165]

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[165] *See* Stewart, *The Reformation of American Administrative Law* 88 Harv. L. Rev. 1667, 1806 (1975):

> There are two possible responses to the realization that legislative discretion is exercised by agencies . . . One might somehow attempt to require the legislature to take back the discretion it has delegated; but such a program overlooks the inability of any single elected body to resolve more than a small proportion of the major issues of collective choice in a developed society. On the other hand, agencies could be invested with the legitimizing rituals of election. However, the formal one-person, one-vote principle which sustains the legislature is too brittle to permit its wholesale application to numerous agencies enjoying substantial measures of discretionary power - hence the effort to develop other modes of representation in adminstrative decision by resort to individuals or organizations that purport to speak for broad classes of private interests. But this stratagem simply pushes back the problem of representation to a prior stage; because the interests of broad categories of individuals, such as "consumers," are not self-defining, we cannot say that a given litigant or organization truly speaks for "consumers" unless there is some mechanism that ensures this.

Concern for the formal authority of an organization to represent a constituency is reflected in the occasional criticism that consumer groups are "self-appointed spokesmen" for the consumer interest.[166] It is also evident in the lines of questioning that some industry spokesmen used to challenge the legitimacy of compensated consumer group witnesses during TRR hearings. The following excerpt from the transcript of the Eyeglass Rule hearing is a fairly typical, if lengthy, example of this tactic. In its counsel for the National Association of Optometrists and Opticians, Mr. Markey, is interrogating a witness from San Francisco Consumer Action who had conducted two field surveys of price advertising among sellers of opthalmic goods and services. The import of her direct testimony was that the proposed rule's removal of state bans on price advertising would not, by itself, increase price competition among sellers.

Mr. MARKEY. . . . What consumers do you represent?
Ms. SCHLETTER. You want their names?

. . . . .

Mr. MARKEY. How many consumers do you represent? That was the question.

. . . . .

Ms. SCHLETTER. Thirty-two hundred
Mr. MARKEY. What are they, paid up members?
Ms. SCHLETTER. Yes.
Mr. MARKEY. Thirty-two hundred consumers. What is the population - is this the Bay area, or just San Francisco?
Ms. SCHLETTER. I think this is in the record

. . . . .

Mr. MARKEY. Can anybody be a consumer advocate or are there certain special requirements attendant to being a consumer advocate?
Ms. SCHLETTER. By FTC requirements or what?
Mr. MARKEY. In this area.
Ms. SCHLETTER. I don't know.

. . . . .

Mr. MARKEY. . . . Is [your testimony] the position of the thirty-two hundred people you represent?
In other words, how many people participated in this and came to the conclusion that this is what is good for consusers and this is what is in the public interest?
Ms. SCHLETTER. It was a study team. We didn't have an election on it.
Mr. MARKEY. How many people?
Ms. SCHLETTER. Approximately twenty.
Mr. MARKEY. Did you take a vote?
Ms. SCHLETTER. A vote? Everybody has read it and has acceded to the results and had input and conversations before we debated and argued and came to these conclusions in a very open way.[166a]

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[166] *E.g.,* A. McFarland, Public Interest Lobbies: Decision-Making on Energy 67 (paper ed. 197): "Crtics refer to [Ralph] Nader as a 'self-appointed' spokesman for the consumer, but such a description can be misleading. He has a constituency which gives him support, just as other politicians do." *See also Hearings on H.R. 3361 and Related Bills (Public Participation in Agency Proceedings) Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 95th Congress, 1st Sess. 563 (1977),

[166a] [add cite]

This line of cross-examination excerpted above is notable both for its implicit assumption that there are, or should be, some formal criteria for authorizing the representative to represent, and for its confusion or uncertainty in suggesting what those criteria ought to be. The questions can be read to imply that San Francisco Consumer Action is both too elite (how many consumers do you represent out of the thousands or millions who live in your area?) and too undifferentiated from the mass (can anybody be a consumer advocate or are there special requirements?). The examination mixes issues concerning the characteristics of the group's membership with questions relating to its internal decision-making procedures (did you take a vote?). In short, the notion of representing consumer interests in Magnuson-Moss rulemaking implies several quite different concepts of authority to represent. To sort out these competing notions of representation, it seems useful to analogize the consumer group situation to more familiar representative relationships.

In considering these comparable situations, the most significant factor seems to be the extent to which a representative is expected or required to have a formal, specific mandate to act, rather than exercising independent judgment on behalf of a principal or constituency. For example, the common law master-servant relationship is one in which the scope of the employee's authority to bind the employer is formally circumscribed by contractual and legal standards, and the servant's actions usually are totally subordinate to the directives of the employer. Somewhat less constrained and specified is the authority of the lawyer to act on behalf of a client. The relationship is still basically contractual and the represented client still retains controls over important decisions; but the lawyer has more latitude for independent judgment as a result of his technical expertise and his professional obligations. The interplay between client wants and lawyer judgment has been described in the following terms by one seasoned Washington lawyer:

> [A]n inherent part of the lawyer's function in being ''for'' his clients is helping determine what exactly *is* their interest in a particular set of circumstances. Certainly, when a corporate client comes to a Washington lawyer with a problem, the lawyer is charged with furthering his client's ''interest''. But often a client knows only in a general sense what the interest is, and seeks the lawyer's skills and knowledge in defining as well as implementing that interest. . . . The definition of this interest is not forged in a vacuum, divorced from considerations of public policy. Here the Washington lawyer in particular has an obligation to present to his client constructive alternatives for harmonizing corporate and public goals. So his job is at least in part that of a mediator seeking a congruence between the public interest and the client's interest.[167]

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[167] Califano, *The Washington Lawyer: When to Say No,* in Verdicts on Lawyers 187, 190 (R. Nader and M. Green, eds., 1976). *See also* D. Rosenthal, Lawyer and Client: Who's In Charge 7 (19—):

> There are two ideas about the proper distribution of power in professional consulting

(Continued)

As the focus shifts from representation of individuals or of hierarchical organizations like corporations to the representation of dispersed groups—that is, from personal to political representation—the representative's independence generally tends to increase. Here, three forms of representation can be distinguished: lobbying, electoral representation, and "descriptive representation." According to some commentators, lobbying is functionally similar to the kind of lawyer-client representation described above, with somewhat greater latitude for the representative to translate diverse, inchoate wants of the constituency into a unified position:

> The act of lobbying is, in very general terms, an act of representation. Like the votes of members of Congress, however, the strategic decisions of lobbyists are not simply mirror images of constituent preferences. An interest group is an intermediary between citizens and government; and it is the task of the organization to convert what it perceives to be the desires of its constituents into specific policies and goals. The choice of issues by the organization is the conversion process by which resources and policy objectives are converted into specific acts of interest articulation and representation.[168]

Others have noted that lobbying organizations and similar voluntary associations tend to become staff-dominated or "oligarchical" in form, with little chance for the rank-and-file to influence policy directly.[169] There are several practical reasons why this should be so. Usually, a voluntary association consists of numerous dispersed "principals" who have little direct involvement in the political environment where the lobbyist functions. Moreover, the numerous strategic and tactical decisions which the lobbyist must make cannot easily be specified in advance, or subjected to membership clearance or ratification within acceptable bounds of time and resources. To be effective, the lobbyist must have a considerable measure of discretion on defining and advancing the group position, and, at times, privacy from even limited disclosures of his activities.

The role of the elected representative seems in many ways comparable. The number of issues on which a typical legislator has a true mandate from his constituency is probably small: not many political issues are sufficiently visible, important to constituents, and foreseeable to affect the outcome of

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(Continued)

relationships. The traditional idea is that both parties are best served by the professional's assuming broad control over the solutions to the problems brought by the client. The contradictory view is that both client and consultant gain from a showing of control over many of the decisions arising out of the relationship.

[168] J. Berry, Lobbying for the People 5 (paper ed. 1977).

[169] *See, e.g.,* sources cited *id.* at 187, nn. 8-10. T. Lowi, The Politics of Disorder 73 (paper ed. 1974).

an election; and even when specific policies are widely desired, there may be little consensus on the best means of achieving or implementing them.[170] Consequently, the elected representative must exercise his judgment, aided by imprecise or ambiguous feedback from the constituency, in representing their interests.

Finally, a different form of political representation, sometimes called "descriptive representation," seeks to avoid the problem of providing the representative with a mandate by structuring the representative body to mirror the composition of the constituency.[171] Just as a scientific sample is supposed to epitomize the population or universe from which it is drawn, the representative body would inherently reflect the preferences, values and knowledge of the larger group, and no directives or consultation would be necessary. Apparently this was the theory that the cross-examiner quoted above was using when he sought to contrast the membership of San Francisco Consumer Action with the population of the San Francisco Bay Area.

Ordering typical representative relationships in this fashion suggests several conclusions about consumer representation in administrative proceedings. If it is generally true that a representative's range of legitimate discretion to act without a specific prior mandate expands as his constituency becomes increasingly large, diverse, and not part of a hierarchical administrative structure, then one can expect that consumer representatives would necessarily exercise a high degree of independent judgment. Even when a consumer protection issue is relatively narrow in scope—for example, sales practices of hearing aid dealers or advertisements used to promote protein supplements—it can have broad impact on geographically dispersed, unorganized individuals. Moreover, consumer protection is, in some respects at least, a "collective good"[172] for which economic theory posits major disincentives to organized action:

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[170] *See, e.g.*, Miller & Stokes, *Constituency Influence in Congress,* — Am. Pol. Sci. Rev. 45 (19—).

[171] H. Pitkin at 60-61 (emphasis in original):

> True representation [some] writers argue, requires that the legislature be so selected that its composition corresponds accurately to that of the whole nation; only then is it really a representative body. A representative legislature, John Adams argues in the American Revolutionary period, "should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them." . . .
>
> . . . . .
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> . . . For these writers, representing is not acting with authority, or acting before being held to account, or any kind of acting at all. Rather, it depends on the representative's characteristics on what he *is* or is *like*, on being something. The representative does not act for others; he "stands for" them, by virtue of a correspondence or connection between them, a resemblance or reflection.

[172] *See generally* Mancur Olson, The Logic of Collective Action (paper ed. 1977). For discussions of the theory in the context of public participation in administrative or political decisionmaking,*see* A. McFarland, Public Interest Lobbies: Decision Making on Energy 27-40 (paper ed. 197); Snow and Weisbrod, Consumerism, Consumers and Public Interest Law, in Public Interest Law 395, 401-406 (B. Weisbrod, J. Handler and N. Komesar, eds., paper ed. 1978).

> [T]here are . . . three separate but cumulative factors that keep larger groups from furthering their own interests. First, the larger the group, the smaller the fraction of the total group benefit any person acting in the group interest receives, and the less adequate the reward for any group-oriented action . . . . Second, since the larger the group, the smaller the share of the total benefit going to any individual, or to any (absolutely) small subset of members of the group, the less the likelihood that any small subset of the group, much less any single individual, will gain enough from getting the collective good to bear the burden of providing even a small amount of it; in other words, the larger the group the smaller the likelihood of oligopolistic interaction that might help obtain the good. Third, the larger the number of members in the group the greater the organization costs, and thus the higher the hurdle that must be jumped before any of the collective good at all can be obtained.[173]

In light of these conditions, it seems unrealistic to demand that consumer representatives have a specific prior mandate from their constituency. How, then, can they be held accountable for the positions they advocate?

The review of representative relationships set forth above suggests that common methods for assuring the accountability of the representative share two general characteristics. First, as the constituency becomes large and diverse, the tendency is to hold the representative to account after decisions are made or actions taken, rather than before. The elected representative may not have a detailed set of instructions from his district, but he knows that he can be replaced if his votes or public positions diverge too sharply from constituent preferences. Similarly, the executive of a voluntary association knows that the leadership cannot often take positions that are distasteful to the members without witnessing a decline in the organization's membership, resources and influence. A second characteristic of the representative relationships described above is that accountability tends to become general rather than specific as the interest represented shifts from personal to diffuse. That is, when the constituency group is large and dispersed, the representative is not expected to seek clearance or approval for each decision he makes, but rather is subjected to periodic review on the general quality of his performance.

The conclusion which seems to follow is that a criticism asserting that a consumer group (or, for that matter, a trade association) failed to take a plebiscite of its membership regarding the particular issues involved in a rulemaking proceeding is rather beside the point. On the other hand, unless the material submitted by the group is so purely technical that constituency ties are irrelevant, it seems feasible and appropriate to require some assurance that the group is exposing itself to the risk of membership disaffection by publicly advocating the positions it is taking in the administrative proceeding. This would involve a showing that the organization obtains a substantial proportion of its revenues from membership dues or public contributions,[174] and that its constituents have been informed, or will be informed, of the positions which the group is advocating. A group's track record of advocating positions similar to the one taken in the present proceeding would therefore be a relevant factor to consider in determining constituency accountability. When the organization does not have a prior history of involvement in the particular subject matter, it should be possible to require the recipient organization to file post-award reports of its communications with its membership, especially if the FTC continues the practice of using supplemental compensation requests to approve participation at each distinct stage of the rulemaking. The FTC may have been trying to assure this kind of constituency accountability in creating its preference for narrow-focus groups.[175] However, this distinction provides only a rough approximation of the kind of accountability discussed here—really, only one example of it—and the preference could have an unnecessarily adverse effect on broad-spectrum groups if it were enforced consistently. Thus, it seems much preferable to address the issue more directly, and require a demonstration that the applicant has some minimal accountability to its constituency.

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[173] M. Olson, *supra* note 172, at 48.

There remains the question of whether there is also a role for "descriptive representation" in a compensation program like the FTC's—that is, whether there should also be an inquiry into the composition or characteristics of the applicant relative to the constituency it purports to represent. As previously noted, this is basically a sampling approach in the sense that the objective of the inquiry would be to determine whether the membership of the consumer group was an adequate reflection of the relevant consumer population.[176] Depending upon how technical one wanted to be in pursuing the sampling notion, the issues could become complex to the point of unmanageability.[177] Whether it is worthwhile for the agency or the Congress to try to frame some standards in this area depends in large measure upon how one views the basic purpose of the compensation program.[178] If one infers from the statue a congressional purpose to underwrite participation costs only for those who can validly claim to speak on behalf of all consumers of eyeglasses or funerals, or all small businessmen in fields like home insulation contracting or hearing aid dispensing, then it would be appropriate to make funding applicants demonstrate that their constituency does not vary materially from the larger groups. On the other hand, if one believes that

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[174] Organizations which provide noncollective goods or services present a special problem under this approach. For example, Consumers Union is financed principally by sales of the magazine Consumer Reports; many trade or professional organizations provide valuable information, advice, and assistance to their members; and some "public interest" organizations sponsor trips, social events, or product discounts. When the noncollective goods are basically incidental to a predominant advocacy purpose (*e.g.*, Sierra Club outings or calendar sales), their provision should not materially affect the accountability of organization spokesmen. The situation is less clear, however, in the Consumers Union situation where the product sale component seems predominant. It could be argued that, since the proceeds of magazine sales are used to finance advocacy efforts. However, since the contribution is "tied" to a sale that seems likely to be the dominant feature in constituent decisions, it may well be that the organization's accountability to its constituency for advocacy positions is fairly attenuated. The Commission might consider requiring applicants to provide information about their dues structure and the nature of noncollective goods or services they provide to members.

[175] *See* text accompanying notes 64-72, *supra*.

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[176] The political science literature suggests that consumer group members are not likely to be typical of the general population. Generally, individuals who join organizations engaged in advocacy relating to political or governmental affairs are, like those who vote in general elections, disproportionately upper-middle class in terms of income, education and status. *See generally* S. Verba and N. Nie, Participation in America: Political Democracy and Social Equality (paper ed. 1972); D. Ippolito, T. Walker and K. Kolson, Public Opinion and Responsible Democracy and Social Equality (paper ed. 1972); D. Ippolito, T. Walker and K. Kolson, Public Opinion and Responsible Democracy (1976); L. Milbrath, Political Participation 110-141 (paper ed. 1969). However, in the present context it is not clear whether, or to what extent, this socioeconomic "bias" should be presumed to affect the group members' policy positions. To the extent they have disregarded the economic incentives posited in the theory of collective goods by joining such a group in the first place, it seems necessary to acknowledge that their policy preferences, as reflected through the group, are based on noneconomic or altruistic considerations.

[177] For a group like San Francisco Consumer Action that does not recruit members on a national scale, it would presumably be necessary either to establish a relevant "geographic market," or to determine that there were not significant regional differences to bias the sample. Moreover, apart from the rare (probably nonexistent) marketing practice that affects all consumers with absolute uniformity, it would arguably be necessary to create a stratified sample to take account of specially affected subgroups. Sample stratification is potentially a slippery slope, since a critic with a modest amount of ingenuity can quickly proliferate variables on which, it can plausibly be argued, the sample should be stratified. To continue with the example of the Ophthalmic Goods rule, which removed state bans on the price advertising of eyeglasses, the following sample arguments are suggestive of the points which could be raised in a strict sampling approach.

> (a) Since visual problems tend to increase with age, the sample has to take account of the age distributions of eyeglass wearers.
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> (b) The cost of eyeglasses takes a proportionately greater share of the income of the poor than of the well-to-do, and the benefits and burdens of the rule are likely to be felt disproportionately by the low-income consumers. Consequently, the sample should be stratified by income level.
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> (c) Price advertising through the mass media is considerably more important to consumers who lack the mobility to comparison shop, either because they are physically handicapped, or because they lack transportation, or because they live in rural or other isolated areas. The sample should be structured to take account of these consumer differences.

[178] *See generally* Part V, *infra.*

the purpose of the compensation provision is to achieve a better balance of viewpoints rather than an optimum system of proportional representation,[179] then a limited or specialized constituency would not be a disqualifying factor. Participation by spokesmen for each additional, otherwise unrepresented or underrepresented, constituency would be a net gain for the decision-making process. This is not to say that the size and composition of a group's constituency would be irrelevant to the agency's assessment of positions espoused by the group. An expressed preference for a particular rule provision would be entitled to more careful consideration if it came from a group whose members comprised a large and typical segment of affected consumers or businessmen that it would be if the organization's constituency was small and atypical. But this should be a general practice in trade regulation rulemaking rather than a feature unique to the compensation program. That is, the composition of a group's constituency should not normally serve to include or exclude them from participating; rather, it should be a factor for decision-makers to consider in determining how much weight to accord to the group's position.

D. *Financial Inability of the Applicant*

The most detailed standard for compensation awards contained in the statute concerns the financial need of the applicant. Funds are to be granted only to an eligible person "who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceedings."[180] The Rules of Practice and the Guidelines elaborate this standard into three general requirements. First, the applicant must provide information describing the economic stake of the interest it wishes to represent, as compared to the cost of participation. The Commission's assumption is that an applicant with a small economic stake (or, presumably, a noneconomic interest) would have diffculty raising the money to participate.[181] Second, in the complementary situation where the economic stake is large in comparison to the cost of participating, the applicant is expected to bear its own costs. There is, however, an important exception "when a large total stake is divided among many separate people so that each individual has little incentive to participate."[182] Applicants who are claiming this "collective goods exception" are required to provide information about the feasibility of raising funds to participate through individual contributions. Finally, the applicant must provide information about its own resources, and the Guidelines reflect the common-sense notion that well-funded organizations will have a more difficult time showing that they will be financially unable to participate without compensation. Again, however, there is an important exception: "A group with substantial resources can be eligible if it is unable to participate because its resources are already committed to other areas, if it has undertaken to cover too many different activities to focus resources on a project as large as an FTC rulemaking, or if other factors would preclude participation."[183]

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[179] *E.g.*, Stewart, *supra* note 165, at 1764: " 'Public interest' advocates . . . do not represent—and do not claim to represent—the interests of the community as a whole. Rather they express the position of important, widely-shared (and hence 'public') interests that assertedly have not heretofore received adequate representation in the process of agency decision."

[180] *See* text accompanying note 33, *supra*.

[181] 16 C.F.R. § 1.17(c) (4) (i) (1978); 42 F.R. 30483 (June 14, 1977).

[182] 42 F.R. 30483 (June 14, 1977).

In light of the prominence given the financial inability standard in the statute, Rules of Practice, and Guidelines, it is perhaps surprising that this factor played a relatively small role in practice. Apparently only two compensation applications were rejected on the ground that the applicant was financially able to participate. The first of these was submitted by an individual witness who was sufficiently candid (or unsophisticated) to inform the FTC that he would testify regardless of whether he was reimbursed.[184] The second was submitted by an industry trade association.[185] In a third situation, an initial compensation award to another trade association was not used because the FTC had required that the award be offset by membership dues and contributions, and the association was successful in raising more than the amount of the grant.[186] Later, the association submitted a supplemental application with updated budget information, and received funding for participation in the post-hearing stages of the proceeding.[187] There seem to be two reasons why the financial inability standard was not invoked more frequently. For one thing, the FTC did not demand, and often did not receive, very detailed financial information from applicants. Second, and more importantly, the Commission interpreted and applied the financial inability standard in such a way as to make detailed examination of applicant finances unnecessary.

As a general matter, applicants in the latter proceedings seemed to provide somewhat more extensive financial information than those who sought funding in the early Magnuson-Moss TRR's.[188] However, even in 1977 and 1978 it was possible to find applicants who had provided only cursory financial data being granted compensation. The "financial need" section of one application in the Children's Advertising proceeding, for example, states in its entirety:

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[183] *Id.*

[184] Applications of Dr. Kurt Oster in Food Advertising proceeding, Aug. 16, 1976; *see also* Action Letter of Nov. 12, 1976.

[185] *See* Action Letter on application of Association of Physical Fitness Centers in Health Spas Proceeding, July 14, 1977.

[186] *See* Action letter of July 20, 1976 on application of National Hearing Aid Society in Hearing Aids proceeding, budget attachment, fn *; Letter from Margery Waxman Smith, Acting Director, BCP, to Anthony Di Rocco, Executive Secretary, National Hearing Aid Society, Oct. 29, 1976; Letter from Anthony Di Rocco, Executive Secretary, National Hearing Aid Society, to Margery W. Smith, Acting Director, BCP, March 30, 1977.

[187] Supplemental Application of National Hearing Aid Society in Hearing Aids proceeding, Sept. 26, 1977; Action letter of Sept. 30, 1977.

> Media Access Project is a non-profit 501(c) (3) corporation with tax-exempt, tax deductible status. Virtually all our activities are funded

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[188] For example, the application of the Iowa Consumers League in the Food Advertising proceeding (March 22, 1976) simply states: "The ICL is a volunteer, non-profit corporation serving the public. It is supported by low dues, and a great deal of volunteer work. No funds are available to the Executive Secretary at this time for travel expenses." The staff home economists of the Consumers Co-operative of Berkeley, who applied successfully in the Protein Supplements rulemaking, provided little, if any, more detail:

> The Co-op home economists are in no position to finance this study. Additionally, due to the nature of this corporation, neither the home economists, as employees, nor volunteers would be allowed to solicit money from individual shoppers.
>
> . . . . .
>
> The Education Department [of the Co-op] does not have resources that could be made available to the home economists for such a study. Furthermore, there is no way we could determine the resources of the population who shop at Co-op.

Application of Consumers Cooperative of Berkeley in Protein Supplements Proceeding, February 4, 1976, at 3. As Appendix A indicates, both of these applicants were successful. While the grants described above involved relatively modest amounts and were submitted by applicants who might well have been inexperienced in proposal-writing, this was not always the case. For example, San Francisco Consumer Action, which received several grants during the period covered by the study, submitted an initial application for over $20,000 in the Used Cars proceeding, and was awarded approximately half of this amount. The application dealt with the financial need issue by asserting that the costs of consumers from practices covered by the rule "probably total to hundreds of millions of dollars annually," and concluding:

> It is not feasible to expect any contribution to the costs of participation by individual consumers. Most are not in a position to individually provide sufficient support for others to represent them. Similarly, the applicant organization operates on a modest and fully committed budget. SFCA has no sources of general revenue which can be tapped for activities of this kind . . . . Without reimbursement for expenses, our participation in the hearings would be severely curtailed and would certainly not adequately represent consumers.

Application of San Francisco Consumer Action in Used Cars Proceeding, at 3. The Golden State Mobilhome Owners League, which was awarded nearly $30,000 for participation in another rulemaking, reported that it had an annual budget in excess of a half a million dollars. "However," the application states, "all of the funds obtained for [from?] membership are spent for designated budget categories. A copy of the budget for the year 1976 is enclosed for your purusal [*sic*], and you can see that the rulemaking income was spent on various budgeted items. The budget for 1977 does not anticipate or contemplate any participation in national mobile home warranty regulation hearings." Application of Golden State Mobilhome Owners League in Mobile Homes proceeding, October 20, 1976, at 2. The documentary record does not contain any indication that the FTC raised any questions about this assertion, or sought any further explanation.

> by foundation grants. All existing operating funds are earmarked for specific projects not directly related to this study. MAP has no general funds to support research of the type contemplated, nor do any of the participants in this project. This project could not be undertaken by Media Access Project, its consultants or its grassroots organization clients without direct financial assistance from the FTC.[189]

No balance sheet, annual report or other financial information was submitted with this application, which was funded for the full amount requested.[190] Another successful application, filed in the Thermal Insulation proceeding, indicated that the applicant had a current fund balance of almost $22,000.[191] No real explanation is given as to why the applicant could not finance its participation out of these funds, other than the conclusory statements that the group would "devote many uncompensated hours" to the proceedings, and that "[w]ithout financial support, we would be unable to participate beyond filing a statement and/or appearing as a witness at a hearing. Even then, no research would underpin our statement."[192] The vagueness of some applicants in describing their financial resources is understandable, since the 1977 Guidelines do not tell the applicants precisely what sort of information should be submitted in order to demonstrate financial need.[193] Moreover, while the Guidelines contain a standard budget from for applicants to use in setting forth the amounts of money they want,[194] there is no comparable standard form on which they could detail the resources they already have.

It would be easy to increase the quantity and quality of financial data provided by applicants with some minor changes in program administration. The harder question, however, is what the FTC could do with more detailed information. As previously noted, the FTC early reached the conclusion that the statute did not limit compensation to applicants who were absolutely indigent; rather, a group would be considered financially unable to participate if it had committed its available resources to other activities. This interpretation was supported by Senators Magnuson and Kennedy in a formal comment on the 1977 Guidelines,[195] and there are some practical

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[189] Application of Media Access Project in Children's Advertising proceeding, June 15, 1978, at 13.

[190] *See* Appendix A.

[191] Application of National Consumers League in Thermal Insulation proceeding, Dec. 29, 1977, attachment containing Statement of Income and Expenses and Changes in Fund Balance, Jan. 1, 1977-Oct. 31, 1977.

[192] Application of National Consumers League, *supra* note 191, at 3.

[193] *See* 42 F.R. 30483 (June 14, 1977).

[194] *Id.* at 30486.

[195] Letter from Senators Warren G. Magnuson and Edward M. Kennedy to Margery Waxman Smith, Acting Director, BCP, Oct. 27, 1976, at 5:

> The statute, by its very language, is concerned solely with the necessity for represen-

reasons for preferring the FTC's construction. The opposite conclusion, that the Act required an absolute insufficiency of resources, would probably make the compensation program a nullity for all but the very small or narrow organization. However, the interpretation adopted by the FTC forces the agency to deal with a complex question: where should the line be drawn between the applicant that is financially *unable* to participate, and the applicant that is simply *unwilling* to devote available funds to the FTC proceeding?

Conceptually, applying the financial inability standard involves two related inquiries—does the applicant have enough resources to participate now, and does it have workable ways of raising additional money—that are likely to be both sensitive and beyond the expertise of an agency like the FTC. Barring the extreme situations in which the applicant has virtually no operating resources (the all-volunteer group), or has all of its operating funds contractually obligated to perform specific projects for other grantors, there is at least a theoretical possibility that the applicant could re-allocate funds. The real problem is whether re-allocation is also a practical possibility, and in this area there are no clear, easily applicable standards for an agency decision-maker to rely on. A consumer organization's decision to shut down an ongoing research, advocacy or complaint-handling project for the purpose of participating in a rulemaking proceeding would involve complex issues of staff expertise, interests, and morale, as well as questions of internal governance procedures, sunk costs and opportunity costs, the likelihood of attracting volunteers, and so on that are largely matters of management discretion. Similar, and perhaps more difficult, management judgments surround the issue of whether the applicant would be able to raise additional funds to support participation. Raising membership dues, or imposing a special assessment, or increasing the price of a product or service like *Consumer Reports* which finances Consumers Union's advocacy efforts, or undertaking direct-mail fundraising, or borrowing against future revenues, are all measures which may entail a significant financial risk to the organization, and have varying chances of success. It is at best difficult for an agency like the Federal Trade Commission to say that the risk is one which the applicant really ought to bear before it becomes eligible for funding.

The tradeoffs become more complex when the applicant is a large-budget organization engaged in numerous activities. The coalition of environmental groups which applied for, and received, funding in the

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tation of a particular interest or interests in a given proceeding. It does not require the Bureau to make judgements as to the value of an applicant's commitment of its own resources *other* issues or endeavors. All the Bureau is required to do . . . is to judge whether or not the applicant is able— based on its resources then available— to afford the costs of effective participation.

Thermal Insulation proceeding is perhaps the best example. Four national environmental organizations—the Sierra Club, Friends of the Earth, Natural Resources Defense Council, and Environmental Defense Fund—submitted a joint application. In the aggregate, these groups had annual budgets of more than 10 million dollars, and the largest of them, the Sierra Club, had annual expenditures of $6.5 million. Yet, all of them plausibly claimed to be operating at a deficit or to have experienced severe budget cutbacks. An organization like the Sierra Club is not only large, it is engaged in extremely diverse activities. The Club's funds are devoted to "studying and influencing public policy, information and education activities, outdoor activities, . . . public law activities . . . administrative costs, . . . costs of servicing memberships, and fund raising activities." Its revenues are derived from "membership dues and admission fees . . . contributions . . . sales, principally of publications . . . royalties on publications . . . and advertising, investment and other income." Faced with an application from such an organization, it would be a massive undertaking fo the Commission to review in depth the group's determinations on the possibility of diverting funds to finance participation in FTC rulemaking. The Commission could respond with a rule declaring large-budget organizations ineligible, on the theory that an entity with a sufficient amount of gross revenues should be able to find the money to participate somewhere in its budget. However, it is by no means clear where the line should be drawn, or whether the statute would permit it to be drawn at all.

Another difficulty with a strict interpretation of the financial inability standard is that it might tend to favor groups with a minimal stake in the outcome of the proceeding over those who were more seriously threatened by a proposed rule, and therefore cut against the "interest" test. That is, the group whose members are likely to be hurt badly by the rule—such as a trade association composed of small retailers who have reason to fear that the TRR would drive many of them out of business—might find it almost impossible to meet the test, because such an overwhelming threat should motivate the members to dig deep in their pockets in support of group participation. On the other hand, a "collective goods" consumer group whose individual constituents had a minimal pocketbook stake in the outcome would find it easier to convice the agency that dues hikes or other fund-raising activities to support participation were not practicable. This kind of strict interpretation could be defended on theoretical grounds,[196] but it would raise questions about the fairness of the compensation program and invite public criticism. The FTC also might find it politically difficult to defend decisions which in effect denied compensation on the ground that the applicant was being hurt too deeply to merit assistance.

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[196] If the principal purpose of the compensation provision is to remedy the disincentives to joint protection of small, diffuse interests, as posited in the theory of collective goods, then it would make sense to deny funding to those who have sufficient incentive to organize and support participation—as the trade association members would, if each of them faced a sufficiently high probability of being driven out of business.

Another problem to be confronted in trying to apply the financial inability test rigorously concerns the applicant who receives general budget revenues, as opposed to project grants or targeted contract funds, from government appropriations. There were two such applications in the Holder-In-Due-Course amendment proceeding, and the outcomes of their petitions seem difficult to reconcile. In the first application, an Assistant Attorney General from the Office of Consumer Protection in the Wisconsin Department of Justice sought travel expenses to testify at the hearings, claiming that "I have previously requested permission from my superiors to testify on this matter in Washington and have been advised that departmental funds cannot be authorized for this purpose."[197] The FTC denied his request, and the Acting Director of the Bureau of Consumer Protection explained this decision by stating:

> The statute is silent on the question of whether governmental entities can be considered financially unable to participate. . . . I believe there is sufficiently serious doubt that Congress intended these funds to be used for governmental officials acting within the scope of their official duties that compensation cannot be authorized in such a situation.[198]

On the same day that this letter was sent, the Acting Bureau Director signed another action letter granting compensation to the National Consumer Law Center, Inc. (NCLC) for participation in the same proceeding.[199] According to its application, NCLC had originated as one of the "backup centers" under the OEO Legal Services program, and currently received all of its operating funds from the federal Community Services Administration for the purpose of performing training, publishing and litigation activities for the Legal Services Corporation.[200] Later decisions apparently followed the pattern set in this proceeding.[201] Yet, it is not obvious why the two applications should be considered distinguishable. In form, the NCLC is a nonprofit corporation,[202] but it is at least arguable that the organization is in fact as much a governmental entity as the Wisconsin Department of Justice. It also seems open to question, as a matter of policy, whether the FTC is a more appropriate body than NCLC's parent agency, CSA, to determine whether the Center should be funded by the government to participate in trade regulation rulemaking. So far as the written record reflects, however, these questions were never considered by the FTC.

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[197] Application of Richard A. Victor, Holder In Due Course Proceeding, Feb. 26, 1976, at 2.

[198] Action letter of March 30, 1976, on Application of Richard A. Victor, Holder In Due Course Proceeding.

[199] Action Letter of March 30, 1976, on Application of National Consumer Law Center, Inc. in Holder In Due Course Proceeding.

[200] Application of National Consumer Law Center in Holder In Due Course proceeding, March 9, 1976, at 1.

[201] *See generally* Appendix A, especially the applications of NCLC in the Vocational Schools and Credit Practices proceedings, and the applications of the Consumer Protection Division, Department of the Attorney General of Massachusetts in the Mobile Homes proceeding. However, the 1977 Guidelines seem to imply that state and local government entities are eligible: "Under these definitions, any entity except a part of the Executive branch of the U.S. Government can apply for compensation." 42 F.R. 30481 (June 14, 1977).

Timing problems would also arise in a rigorous application of the financial inability standard, since disputes could arise on the question of when an applicant's budget should be considered committed to other activities. The FTC might have to decide whether the applicant knew (or should have known?) about the impending rulemaking in sufficient time to allocate funds from its current-year budget—an issue that would be complicated by the FTC's current practice of publishing periodic regulatory agendas describing impending TRR proceedings.[203] For example, the question might arise as to whether a published reference to a projected TRR in the FTC's regulatory agenda should be sufficient notice to alert consumer and business groups to ''re-program'' some of their budget categories in order to support participation. Moreover, since TRR proceedings typically took several years to complete, a strict approach might also require the agency to limit any grant of funds to the current fiscal cycle of the applicant organization, and to compel the applicant to re-justify its need for compensation if it failed to allocate sufficient money for participation in the next year's budget. In practice, the FTC seemed to accept at face value the applicants' assertions that they had already committed their funds to other projects before becoming involved in the FTC proceeding, and did not re-open determinations of financial inability if the proceeding extended over several years.

Beyond the difficulties of formulating workable standards to govern individual decisions, more rigorous enforcement of the financial inability test could create significant administrative problems for the FTC. As the foregoing discussion suggests, financial inability criteria are likely to be complex and difficult to apply, and therefore would proliferate the factors that the agency must consider in making compensation decisions. In an agency like the FTC which has limited staff resources to administer the compensation program and often is under pressure to make prompt decisions on applications,[204] this could be a real detriment. Moreover, detailed information about the financial management and resource allocations of an applicant organization is likely to contain sensitive data, and difficult confidentiality issues may arise if an adversary party seeks access to the information. This problem arose in the Mobile Homes proceeding, when a dealers' association that received some financial support from manufacturers sought compensation,[205] and a trade association representing manufacturers requested disclosures of the applications under the Freedom of Information Act. The dealers' association urged the FTC to deny the request, arguing that disclosure might compromise their independence and temper their advocacy in the proceeding:

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[202] Application of NCLC, *supra* note 200, at 1.

[203] *See, e.g.,* 44 F.R. 45178 (Aug. 1, 1979).

[204] *See* text accompanying notes 209-218, 242-249, *infra.*

> [T]he dissemination of information providing details [on financial inability] . . . may render a participant vulnerable to subtle pressures in the proceeding.
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> . . . To reveal the confidential financial information contained in the application would work a great prejudice to mobile home dealers. . . . Indeed, such information could conceivably be put to uses which might make it difficult for the [applicant] to continue in the proceeding. . . . The public interest in adequate dealer participation would not be served by such a result, and the Commission's duty to protect the fairness and adequacy of its own proceedings would be violated.[206]

The FTC denied release of a portion of the financial information in the application on the ground that it was exempt as confidential financial information whose release would cause competitive harm.[207] But it is not clear that this interpretation would withstand a court challenge, especially if the application in question had not been submitted by a business group. Thus, the agency might well conclude that some eligible groups would be deterred from applying for compensation if they knew that the details of their finances would be laid bare to adversaries or competitors. This problem would not arise, of course, if the FTC did not collect such fine-grained financial information in the first place.

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[205] Application of National Manufactured Housing Federation in Mobile Homes proceeding, Nov. 28, 1977.

[206] Letter from Quincy Rodgers, Counsel for National Manufactured Housing Institute, to Bonnie Naradzay, Special Assistant for Public Participation, Jan. 20, 1978, at 1. The confidentiality disputes continued into the subsequent stages of the proceeding, when the Federation filed applications for supplemental funding. *See* Letter from Michael R. Lemov and Quincy Rodgers, Counsel for NMHF, to Bonnie Naradzay, Jan. 31, 1978, requesting confidential treatment for attorneys' time sheets as privileged work product; letter from Michael R. Lemov and Quincy Rodgers to Bonnie Naradzay, Feb. 1, 1978, requesting confidential treatment of application for supplemental funding for post-hearing stages on the ground it contains privileged work product (lawyers' strategies); Letter from Michael R. Lemov to Bonnie Naradzay, Apr. 24, 1978, requesting confidential treatment of financial information under exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b) (4) (1976); Letter from Quincy Rodgers to Bonnie Naradzay, May 11, 1978, at 2, requesting confidential treatment of billing information on the ground that it reflects applicant's financial condition and attorneys' strategies.

[207] *See* Letter from Richard C. Foster, Deputy Director for Operations, BCP, to C.W. Quincy Rodgers, Feb. 8, 1978.

In short, for a variety of theoretical and practical reasons, it is potentially very difficult for an agency like the FTC to give precise content to a financial inability test. This conclusion seems consistent with the experience of other agencies which have developed direct funding programs similar to the FTC's. While the different agencies have taken a variety of approaches in drafting their critera, the financial inability tests basically seem to come down to the question of whether an applicant's claim of financial inability seems reasonable to the agency.[208]

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[208] For example, the FDA's compensation rules require the applicant to submit more detailed information than the FTC's, *see* 44. F.R. 23053-54 (April 17, 1979), but then direct the decision-makers to assess the information under the broad reasonableness standard: they must make a finding that "[t]he applicant does not have available, and cannot reasonably obtain in other ways, sufficient resources to participate effectively without reimbursement." *Id.* at 23055. The Environmental Protection Agency's temporary compensation rules under the Toxic Substances Control Act generally direct applicants to show how they comply with the financial eligibility requirements of the statute but they do require applicants to provide some more detailed discussion of the "opportunity cost" situation:

> It will be helpful if, in cases where eligibility is asserted on grounds of a small financial interest, rather than total inability to participate if compensation is not granted, the application also sets forth what other planned activities of the applicant will have to be curtailed if compensation is not granted. Such statement of curtailment should be supported by a budget. . . .

42 F.R. 60911 (Nov. 30, 1977). This is a novel approach, since it presumes that the applicant will curtail other activities and participate in the EPA proceeding if funding is denied—in which case it would be difficult to find that the applicant is truly unable to participate. The Agriculture Department's proposed compensation regulations dealing with financial eligibility are somewhat longer than the FTC's or EPA's, but the key provision on financial inability simply directs the decision-makers to consider "[t]he amount of an applicant's assets that are firmly committed for other expenditures." 44 F.R. 17510 (March 22, 1979).

It should also be noted that one agency which has adopted compensation rules to deal with the "absolute indigency" situation also uses a reasonableness test. The Federal Communications Commission's standard provide:

> The group [seeking funding] would be required to show that it cannot meet the necessary expenses of participating and "simultaneously carry on reasonable activities."
>
> . . . . .
>
> In the case of an intervening group, the motion to proceed in forma pauperis shall contain specific allegations of fact sufficient to show that the moving party . . . cannot pay the expenses of litigation and still be able to carry out the activities and purposes for which it was organized.

Memorandum Opinion and Order In re Rules and Policies to Facilitate Participation of Indigent Persons in Commission Proceedings 2, App. A §1.224(c) (2) (FCC Docket 76-1046, Nov. 30, 1976).

IV. ADMINISTRATION OF THE COMPENSATION PROGRAM

During the four-year period covered by this study, there were frequent changes in the procedures for processing compensation applications, and in the personnel making the compensation decisions. The authority to compensate participants was delegated to the FTC without much warning, and there was no substantial body of prior experience to build such a program on, either within the Commission or in other agencies. Moreover, there was initially a substantial lag in obtaining sufficient personnel to run the program. Given this rather inauspicious beginning, it is perhaps not surprising that it took some time to develop a workable administrative structure for making and supervising compensation awards.

A. Procedures for Decision-Making

The initial Rules of Practice under the Magnuson-Moss Act delegated final authority for acting on compensation requests to the Director of the Bureau of Consumer Protection, and provided that the Presiding Officer assigned to a rule would review applications and submit "initial findings" to the Bureau Director.[209] By the fall of 1975, as substantial numbers of compensation applications began to arrive at the Commission, a committee (called at various times the Screening Committee, the Grant Funding Committee and finally the Compensation Committee) was created to review the Presiding Officers' findings and make recommendations to the Bureau Director.[210] The committee was composed of the Assistant Directors who headed the divisions of the Bureau of Consumer Protection where trade regulation rules originated, as well as representatives from the General Counsel's office, the Division of Management, and the Bureau Director's personal staff.[211] Initially, the committee had no support staff of its own; scheduling and recommendation-writing tasks were handled by an Assistant to the Bureau Director, who was also a member of the Committee. By May of 1976, the new position of Special Assistant for Compensation was created within the Bureau to manage the growing administrative workload associated with the compensation program.[212] This system remained in effect until early 1978, when the two Acting Bureau Directors who had supervised the early stages of implementation had been supplanted by a permanent Director. After some initial experience in deciding compensation applications, the new Director delegated this responsibility to a Deputy Director in the Bureau of Consumer Protection.[213]

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[209] 40 F.R. 33969 (Aug. 13, 1975). The rule also stated that "[i]n connection with his determination the presiding officer may conduct such inquiry of the applicant or require the production of such documents as he deems necessary." *Id.*

[210] Interview with Lee H. Simowitz, Assistant to the Director, Bureau of Consumer Protection, Jan. 27, 1976; Interview with James V. DeLong, Assistant Director, Division of Special Projects, Bureau of Consumer Protection (Jan. 27, 1976).

[211] Through most of 1976, the divisions represented on the Compensation Committee were National Advertising, Market Practices, Evaluation, and Special Projects. Late in 1976 the Committee was expanded to include a representative from the Division of Special Statutes.

[212] Interview with Bonnie J. Naradzay, Oct. 19, 1976. Originally the administrative work had been handled by one of the Bureau Director's personal assistants. *Id.*

After a new FTC Chairman had been appointed and an internal review of the compensation program had been completed, responsibility for compensation decisions was shifted to the General Counsel's Office in the fall of 1978.[214] There was no official explanation of this shift,[215] but it was evidently motivated by concern to keep the compensation decisions as independent as possible from the Bureau and the staff attorneys assigned to the rule.[216] Other changes in the administration of the program were also adopted at about the same time. The Special Assistant for Public Participation was also transferred to the Office of General Counsel and her duties, which had previously included some Freedom of Information work, were limited to administration of the program compensation.[217] The membership of the Compensation Committee was also altered. The heads of the operating division in the Bureau of Consumer Protection were dropped because their attendance at committee meetings had declined; on the other hand, a survey research expert from the Office of Policy Planning was made available to critique research proposals in compensation applications.[218]

These multiple changes seem to reflect the FTC's efforts, through a process of trial and error, to find an administrative structure that would strike a workable balance among several potentially conflicting objectives. One such tradeoff involved both the need for substantive knowledge of the proceedings where funding was sought, and for sufficient perspective and impartiality to keep the program independent of the staff conducting the rulemaking proceedings. Another concerned the need to have sufficient clerical and administrative manpower to keep the paperwork (and money) flowing, while in the bureaucracy to give them status and legitimacy within the agency. Limitations on the availability of personnel "slots" precluded some alternatives at the outset, such as establishing an independent compensation office headed by a senior person with experience in grant administration, supported by full-time clerical and secretarial help. The alternative initially chosen was to set up a high-level advisory committee whose members would each devote part of their time to helping develop criteria, and to cannibalize sufficient staff resources to process applications wherever available people could be found. As the removal of the division heads from the Compensation Committee indicates, this strategy was not fully successful, but it did serve to get the program off the ground.

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[213] Statement of Gale P. Gotschall, Deputy Director for Federal-State and Consumer Relations, Federal Trade Commission, on Senate Bill No. 707, Public Service Commission-Citizen Participation, Before the Economic Affairs Committee of the Maryland State Senate, Feb. 24, 1978, at 2.

[214] 43 F.R. 39083 (Sept. 1, 1978).

[215] The Presiding Officers in TRR proceedings were shifted to the General Counsel's office at the same time. The only explanation given in the Federal Register notice was that "[t]his transfer is being made as a matter of policy to enhance the management and work product of these programs." 43 F.R. 39083-84 (Sept. 1, 1978).

[216] Interview with Michael Sohn, General Counsel, and Barry Rubin, Office of General Counsel, FTC, Jan. 15, 1979.

[217] *Id.* The Special Assistant for Public Participation was also assigned a full-time clerical and administrative assistant.

[218] *Id.*

B. *Roles of the Presiding Officers and Staff*

On the face of the Rules of Practice, the Presiding Officer appears to be the key person responsible for gathering and analyzing facts relevant to a compensation decision. In practice, however, there were several reasons why the Presiding Officer's contribution often seemed more formal than substantive. A major problem was time pressure. Applications typically were not received until after the publication of Final Notice, when the Presiding Officer was busy trying to familiarize himself with the issues and the record. During this period, he was also completing a variety of tasks necessary to move the proceeding along toward hearing, such as grouping hearing participants and overseeing the selection of representatives for the designated groups, fielding prehearing motions, and working out the details of hearing management through prehearing conferences, letters, and phone calls. In this bustle of activity the Presiding Officers probably had little time or effort to devote to compensation questions. Also, when applications were deficient and decisions had to be made quickly because applicants needed time to prepare for the hearing, it was easier for the Special Assistant for Public Participation to deal directly with the applicant rather than following the three-step process that required separate consideration by Presiding Officer, Compensation Committee, and Bureau Director. Such deficiencies and ambiguities in applications could easily escape the Presiding Officer's attention because the Presiding Officers had no regular "feedback loop" through which they could know the detailed standards currently applied by the Compensation Committee.[219] Especially in the early days of the program, the absence of detailed guidelines, or a precedent system, or any other means for communicating the interpretations of the compensation standards that were evolving in the Compensation Committee, meant that the Presiding Officers could not provide fully informed recommendations.

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[219] Interview with Henry B. Cabell, Presiding Officer, Jan. 21, 1976; Interview with Christopher Keller, Presiding Officer, Sept. 22, 1976; Interview with Jack Kahn, Presiding Officer, Jan. 21, 1976.

Given these practical limitations, it is not surprising that different Presiding Officers construed their duties under the compensation program quite differently. Some Presiding Officers made extremely conclusory, one-or-two-sentence recommendations which simply urged grant or denial of funding;[220] others made detailed findings on each of the elements enumerated in the Rules of Practice, supported by careful analyses of policy considerations;[221] and in a few instances Presiding Officers attended Compensation Committee meetings to discuss policy questions raised by a particular application.[222] There is no indication that Bureau officials tried to standardize or upgrade the Presiding Officers' recommendations.

In contrast to the Presiding Officers, the staff attorneys assigned to the rule had no formal role in the processing of compensation applications, but in practice they could have substantial influence. Staff recommendations, at least on initial compensation applications, were a routine feature of the program. In a sample of 84 files containing initial compensation applications from the early Magnuson-Moss proceedings, there was some indication on the written record that staff had expressed its views regarding the merits of the compensation requests for slightly more than half of the cases.[223] In addition, it seems clear that there were other cases in which staff opinions were expressed orally.[224] The reason for staff involvement is that the staff attorneys had better information than either the Presiding Officer or the higher-level Bureau officials with respect to two important compensation criteria: the novelty of the information that the applicant proposed to offer, and the general competence and expertise of the applicant organization.[225] By virtue of its pre-rulemaking investigation and hearing preparation, staff was more familiar than any other Commission personnel with the present and projected state of the record. Investigation and preparation also involved frequent personal contacts between staff and a wide variety of persons and organizations possessing some expertise in the subject-matter of the rule. As a result, staff was likely to have some independent information about the applicant's reputation and "track record."

The problem, however, is that staff attorneys' familiarity with the industry and their responsibility for developing the proposed rule often seemed to give rise to strong feelings about the need for regulation and the shape that rule provisions ought to take. In other words, the adversary atmosphere observed at some rulemaking hearings[226] could be firmly established by the time compensation applications were acted upon. When this happened, staff might tend to look more favorably on the compensation applicant who favored the rule than one who was critical of it. The extent to which staff's advocacy position actually colored their recommendations is impossible to measure. Staff attorneys' attitudes toward the compensation applicants seemed to cover a broad spectrum of views: resentment that outsiders would want to meddle in "staff's case"; enthusiasm for having a backup group that could fill gaps in the evidence marshalled by staff; a tactical preference for having a consumer group take a stronger pro-regulation position so that staff's proposed rule would become the reasonable compromise position; and neutrality if not indifference toward the compensation program. The aggregate figures on the correspondence between staff recommendation and final action, when that information could be found in the files, do not suggest that staff had markedly greater influence than the Presiding Officers on compensation awards. The agency decision agreed with the staff recommendation in 72 percent of the cases studied, whereas the Presiding Officer's recommendation was followed in 79 percent.[226A] One reason why the staff influence may not have been greater was that members of the Compensation Committee were aware of the staff attitudes and the incentives that gave rise to them, and may have weighted or discounted the staff recommendations accordingly.[227]

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[220] Confidential FTC Documents 22 and 23.

[221] Confidential FTC Document 24.

[222] Confidential FTC Documents 25 and 26.

[223] *See* Appendix C.

[224] Interview with William D. Dixon, Special Assistant for Rule-making, Bureau of Consumer Protection, FTC, Feb. 7, 1976; Interview with Arthur Angel, Staff Attorney, Funeral Practices rule, June 1, 1977. In one proceeding, the head of the operating division where the rule originated delegated his seat on the compensation committee to one of the staff attorneys assigned to a rule in which numerous compensation applications were pending.

[225] Interview with Arthur Angel, Staff Attorney, Funeral Practices rule, June 1, 1977; Interview with Terry Latanich, Staff Attorney, Ophthalmic Goods rule, May 25, 1977; Interview with Bonnie J. Naradzay, Special Assistant for Public Participation, Oct. 19, 1976.

To the extent that potential staff influence over compensation decisions remains a problem, there appears to be a limited range of alternatives available to minimize any unfairness associated with that influence. The possibility of eliminating staff input altogether seems infeasible, so long as compensation decisions must take account of whether the information that the applicant proposes to present will duplicate other record material. Removing compensation authority from the agency altogether and placing it in some independent entity would not avoid the issue, because the compensating authority would have to turn to the FTC for some assessment of the state of the record, and the staff attorneys would be the only ones in a position to provide an informed response. Public disclosures of staff recommendations would minimize any appearance of unfairness, but some FTC officials are strongly resistant to this idea,[228] perhaps because a precedent could be established that would create pressure for disclosure of other, more sensitive staff recommendations. Finally, there is some reason to believe that the restructuring of the Compensation Committee has significantly reduced staff influence. The heads of the operating divisions, who might have felt pressure to "back" their subordinate staff attorneys by supporting an application that the staff favored, are no longer members of the committee. Perhaps more importantly, the committee now has access to an independent survey research expert, and this change seems to have reduced staff influence over an important category of evidence. The survey expert can deal more effectively than staff attorneys with the qualitative aspects of an application to conduct systematic or expert studies—whether the study's design meets accepted professional or scientific standards, whether the applicant's researchers are qualified to undertake the study, and the like. Staff's unique input is effectively reduced to the quantitative issue of how much similar material is already on the record, or scheduled to be introduced. This is a fairly straightforward factual inquiry that is less prone to bias or manipulation than qualitative judgments.

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[226] *See* the section of Part I of the ACUS report on trade regulation rulemaking procedures relating to public hearings.

[226A] *See* Appendix C.

[227] Interview with Bonnie Naradzay, Special Assistant for Compensation, Oct. 19, 1976; Interview with James V. Delong, Assistant Director, BCP, June 11, 1976.

[228] Interview with Michael Sohn, General Counsel, and Barry Rubin, Office of General Counsel, FTC, Jan. 8, 1979.

As the compensation program evolved, then, the potential for staff influence or control may arise less in the structural process for deciding upon compensation applications than in the informal contacts between staff attorneys and representatives of the groups which are applying for compensation. This latter issue raises the broader question of the need for special notice-giving or "outreach" activities in a direct-funding program like the FTC's.

C. *Outreach*

Since the FTC had difficulty simply in assembling the personnel and designing the procedures to decide upon compensation applications, it is not surprising that agency officials devoted little attention in the early days of the program to the process of notifying potential applicants and inviting them to seek reimbursement. By default, the process of getting the word out fell to the rulemaking staffs;[229] the early Federal Register notices for TRR proceedings did not even mention the existence of the compensation program.[230] Compensation applicants in the pre-guidelines proceedings indicated that they had numerous pre-application and post-application informal contacts with staff. Some applicants had been solicited to testify or to apply for compensation by staff members;[231] other had informal discussions with staff about the criteria being applied to compensation applications, or the amounts of compensation being awarded;[232] and some worked closely with staff attorneys in developing their strategies of participation.[233]

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[229] Interview with James V. DeLong, Assistant Director, BCP, March 10, 1976.

[230] *See, e.g.*, 40 F.R. 41144 (Sept. 5, 1975) (Initial Notice of Protein Supplements proceeding); 41 F.R. 10232) (March 10, 1976) (Final Notice of Protein Supplements proceeding). More recnt rulemaking notices have contained a brief notice of the compensation program, and the name and address of a contact person. *See, e.g.*, 43 F.R. 17972 (Apr. 27, 1978) (Children's Advertising proceeding); 43 F.R. 57283 (Dec. 7, 1978) (Standards and Certification proceeding).

The 1977 Guidelines sought to put greater distance between staff and potential applications by advising applicants to direct their inquiries to other parts of the agency:

> The staff will assist any prospective applicant only by describing information on the material to be introduced into the rulemaking record. Direct your questions about the proceedings to the Assistant Director for Rulemaking and about the application process to the Special Assistant for Compensation.
>
> Neither the staff nor the Presiding Officer will help write an application, provide special favors or services to any particular applicant, or penalize any applicant for taking a position at variance with that of the staff. In addition, neither the staff nor the Presiding Officer can commit the Bureau to approving or rejecting a particular application.[234]

The published directive was supplemented by internal FTC efforts to prevent staff attorneys from contacting applicants for additional information or negotiating with them after an application had been filed.[235] Interviews with compensation applicants conducted after this policy had been put into effect seemed to indicate that most contacts relating to procedures for applying and criteria for granting compensation were being directed to the Special Assistant administering the program rather than to staff.[236]

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[231] *E.g.*, Interview with Kathleen O'Reilly, Consumer Federation of America, Funeral Practices proceeding, Feb. 16, 1977; Interview with John C. Hendrickson, Vocational Schools proceeding, March 17, 1977; Interview with Margaret Phillips, Society for Nutritional Education, Food Advertising proceeding; Interview with James Turner, D.C. Consumer Action, Food Advertising proceeding, Aug. 16, 1976.

[232] *E.g.*, Interview with Rebecca Cohen, Continental Assn. of Funeral and Memorial Societies, Funeral Practices proceeding, Oct. 26, 1976; Interview with Glen Nishimura and Timothy Holcolm, Arkansas Consumer Research, Funeral Practices proceeding, March 9, 1977.

[233] *E.g.*, Interview with Lonnie Von Renner, counsel for Americans for Democratic Action and/or National Council of Senior Citizens in Prescription Drugs, Funeral Practices and Ophthalmic Goods proceedings, Feb. 15, 1977; Interview with Mark Silbergeld, Consumers Union, Funeral Practices and Food Advertising proceedings, Feb. 7, 1977.

[234] 42 F.R. 30484 (June 14, 1977).

[235] 1978 Revision of FTC Operating Manual, Section 7.3.14; Confidential FTC Document 27.

[236] *E.g.*, Interview with Miles Frieden, CalPIRG, Used Cars, Credit Practices and Thermal Insulation proceedings, Apr. 3, 1979; Interview with Katherine Meyer, Center for Auto Safety, Used Cars and Mobile Homes proceedings, March 20, 1979; Interview with Gerald Thain, Center for Public Representation, Used Cars, Thermal Insulation and Children's Advertising proceedings, Apr. 5, 1978

However, there still was a significant amount of contact between applicants and staff for the purpose allowed in the Guidelines—that is, to find out what types of material were already in the record, and what kinds of testimony the staff expected to be introduced at the hearings.[237] Given the size and practical inaccessibility of many TRR records, this sort of contact seems an inevitable and desirable way to minimize duplication.

As the question of who should be contacting potential applicants was being resolved, the issue of how the Commission should try to get the word out was also receiving attention. One factor which may have led the Commission to reconsider its notice-giving activities was the pattern of compensation awards that was emerging from the early years of the program. Several consumer groups, primarily the larger organizations headquartered on the East and West Coasts, were applying for compensation repeatedly (and successfully); few applications were submitted by groups from other regions, and their proposals were often limited in scope. At the same time, small business applicants were notable by their absence. As discussed below,[238] this concentration of awards among "repeat player" applicants provided grounds for criticism by both supporters and opponents of the FTC.

To offset this tendency, the FTC initiated several "outreach" activities. In 1978, the Commission sponsored a conference organized by the Center for Public Representation, a Madison, Wisconsin public interest group, that was designed to find potential applicant groups in the Chicago area and educate them on FTC rulemaking and the compensation program.[239] In addition, a special effort to reach small businessmen was made in the Standards and Certification rulemaking. Four seminars were held in major cities, and the FTC contacted the Small Business Administration and the Chamber of Commerce with a request to inform their constituencies of the compensation fund.[240] It is still to early to evaluate the effects of these efforts, although it should be noted that a relatively large number of business representatives have applied for compensation in the Standards proceeding.[241] However, one general conclusion for the administration of direct funding program does emerge from the FTC experience. At least when an agency has constituencies as diverse and dispersed as the FTC, the word will not automatically get out that the agency has funds available to support public participation. If the objective is to attract a wide variety of groups into the proceedings, then it is necesssary to devote time and effort to reaching those who are not already part of the network of contacts and acquaintances that operates for insiders.

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[237] Interview with Edward Kramer, The Housing Advocates, Mobile Homes proceeding, March 27, 1979; Interview with Bruce Terris, March 8, 1979; Interview with Robert Choate, Council on Children, Media and Merchandising, Food Advertising, OTC Drugs, OTC Antacids and Children's Advertising proceedings March 23, 1979.

[238] *See* ________.

[239] Interview with Michael Sohn, General Counsel, and Barry Rubin, Office of General Counsel, FTC, January 8, 1979; [add cites].

[240] Sohn-Rubin Interview, *supra* note 239; Telephone Interview with Bonnie Naradzay, Special Assistant for Public Participation, June 15, 1979; [add cite—Creswell interview].

[241] *See* Appendix —.

D. Timing

Time pressures were a recurring problem in administration of the compensation program. Both early and late in the period covered by the study, compensation applicants complained of delays in getting a decision on their requests and of inadequate time to prepare testimony or submissions.[242] Of course, this sort of complaint is not unique to the compensation program; many of the uncompensated participants in TRR proceedings complained of deadline pressures and sought extensions of time. Nevertheless, there are some special timing problems that affect the successful functioning of a direct funding program.

(1) *Filing deadlines.*—Neither the Rules of Practice nor the 1977 Guidelines set filing deadlines for the submission of compensation applications. There are some policy considerations favoring this approach, including the desirability of keeping the application process as simple and flexible as possible and the very real possibility that, given the length and complexity of TRR proceedings, some applicants who start with adequate financial resources will later find themselves in need of assistance. Flexible deadlines also permit applicants to amend a deficient initial application in response to agency comments and criticisms. However, the absence of deadlines can cause problems for the agency. For example, when an application arrives on the eve of the proceeding stage where the applicant wants to participate, the decision-makers may have to wrestle with difficult questions as to whether the applicant really has enough time to prepare adequately. This was a common problem with survey research proposals. As Appendix D indicates, more than half of all initial applications arrived

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[242] *E.g.,* Interview with Katherine Meyer, Center for Auto Safety Mobile Homes proceeding, March 22, 1979; Interview with Irmgard Hunt, Consumer Action Now, Protein Supplements proceeding, Apr. 3, 1979; Interview with Miles Frieden, CalPIRG, Used Cars, Credit Practices and Thermal Insulation proceedings, Apr. 3, 1979; Interview with Robert Choate, Council on Children, Media and Merchandising, Food Advertising, OTC Drugs, OTC Antacids, Children's Advertising proceedings, March 26, 1979; Interview with Mark Silbergeld, Consumers Union, Funeral Practices and Food Advertising proceedings, Feb. 7, 1977; Interview with John Pound, Ken McEldowney and Karen Tomovick, San Francisco Consumer Action, Vocational School proceeding, Dec. 12, 1975. It should be noted that not all of the representatives interviewed criticized the FTC for timing difficulties. One interviewee reported that the response time on the group's application was faster than any other government agency's Interview with Edward Kramer, The Housing Advocates, Mobile Homes proceeding, March 27, 1979.

in the period between publication of Final Notice and the first deadline for filing testimony. This meant that organizations which were funded to do empirical research were operating on tight timetables, even if the "turn-around time" for granting their request was negligible. The problem was even more severe under the experimental expedited procedures used in the Thermal Insulation proceeding, which eliminated the two-notice procedure and greatly shortened the prehearing stage of the process. There, two applications were rejected on the ground that the proposed research could not be completed within the time available.[243]

The lack of deadlines also created a bit of a dilemma in the situation where applications for a given activity—such as hearing testimony—trickled in over a period of time. If the Commission acted promptly on the early applications, it might foreclose a better but slower applicant who appeared later.[244] If, on the other hand, the Commission waited until most or all of the applications were in before choosing among them, it could be penalizing the prompt applicant who needed substantial time to prepare his presentation. This dilemma ultimately seems insoluble; in practice, the FTC steered a kind of middle course by acting upon the applications in waves and trying to get some advance notification of which groups intended to apply later, and what kinds of proposals they would submit.[245]

(2) *Supplemental applications.*—The Commission's practice of requiring applicants to file supplemental funding requests at each discrete stage of the proceeding rather than granting compensation to cover all subsequent stages of the process[246] also created some timing pressures. There were probably several reasons why the FTC adopted this approach. In the early stages of a TRR proceeding, it was difficult for both the applicant and the Compensation Committee to determine whether, and why,

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[243] Action Letter on Application of California Public Interest Research Group in Thermal Insulation Proceeding, Jan. 24, 1978; Action Letter on Application of Arizona Consumers Council in Thermal Insulation Proceeding, Jan. 24, 1978.

[244] The foreclosure could be based on several grounds: the information that the second applicant proffered was being supplied by the first; the interest of the second applicant was already represented; the available funds were already committed; and so on.

[245] *See generally* the detailed time charts in Appendix E.

[246] 1977 Guidelines, 42 F.R. 30483 (June 14, 1977):

> You need not file a complete application at the outset. You may ask for compensation for one type of participation immediately and broaden your application after further study.
>
> . . . . .
>
> You should not submit an application for post-hearing rebuttal participation until after the hearings are over. At that time, you will be able to state with some specificity which issues you have determined to rebut.
>
> Your application for post-hearing comments should come after you have read either the Presiding Officer's report or the final staff report or both.

participation at the end stages of the process might be necessary. The use of supplementals also permitted the agency to avoid committing a large portion of available funds a long time before they would be used in a multi-year proceeding, a practice which might result in reversion of unexpended funds to the Treasury if they were not used in the current fiscal year. Requiring applicants to file supplemental applications for later participation might also give the FTC more leverage to cut off funding if the recipient performed poorly in the early stages.[247] However, supplemental funding decisions for some forms of participation were difficult to fit into the general timetables established in the Rules of Practice. For example, the Rules of Practice provide a period of 60 days after issuance of the final staff report during which interested persons may comment on the staff's and Presiding Officer's final reports. These staff reports frequently ran to several hundred pages, and they were dense with citations to materials scattered throughout the record. As a practical matter, it would often be impossible for an applicant to review the staff report, apply for compensation, within the 60-day period.[248] One method developed to deal with this problem was to grant such applications before the staff report was issued, but after the group had had time to review the Presiding Officer's report.[249] More generally, however, this issue suggests that careful advance planning of the relationship between compensation decisions and the procedural timetables used in the underlying proceedings is necessary in order to avoid either delaying the proceedings or placing an unreasonable burden on the applicants.

(3) *Advance payments.*—Perhaps the most serious timing problem from the applicants' point of view is delay between the time funding is approved and the money actually is disbursed. Many consumer groups, and some trade associations as well, seem to operate on minimal budgets and lack sufficient "front money" of their own to support participation. The FTC resolved this issue in its initial Rules of Practice by explicitly authorizing advance payments,[250] and this provision seems necessary if the groups which are most in need of funding are to participate effectively in a complex, expensive proceeding like trade regulation rulemaking. Even with this

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[247] The 1977 Guidelines pointedly note: "Your performance on one phase will, of course, be considered in the review of applications for [compensation] in later phases." *Id.* On the other hand, grant of the earlier application could create some momentum to continue funding at the later stages. *See, e.g.,* Letter from Bruce Terris, representative of Environmental Coalition in Thermal Insulation Proceeding, to Bonnie Naradzay, Special Assistant for Public Participation, Aug. 11, 1978, where reference is made to the "drastic step of cutting off funding to a designated public group."

[248] Confidential FTC Document 28.

[249] Action letter on supplemental applications of NCSC, ADA-CAC, NYPIRG, CAFMS, ACR and CAMP in Funeral Practices proceeding, Sept. 30, 1977.

[250] 16 C.F.R. § 1.17(e) (1978): "The Commission may make any payments under this section in advance where necessary to permit effective participation in the rulemaking proceeding."

advance funding proviso, several consumer group spokesmen interviewed during the course of this study reported serious cash flow problems when there were delays in receiving compensation funds.[251] Fast action on requests for advance payments or claims for reimbursement should be a high priority in any effective compensation program—and this requires the assignment of sufficient personnel so that the necessary paperwork can be completed promptly.

E. Levels of Compensation

The question of what the maximum levels of reimbursement should be for compensable activities served as a continuing source of friction between the FTC and compensation applicants. Disputes centered on two related issues: maximum attorneys' fees and computation of overhead.

The Magnuson-Moss Act simply provides that the FTC may "provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding."[252] As the dispute unfolded, it became clear that one issue dividing the FTC and the public interest bar concerned reimbursement of staff counsel for public interpretation of two words in the Act: the Commission emphasized the statute's reference to "costs" of participation and took the position that staff lawyers could be compensated only for their actual salaries, while the groups argued that "reasonable fees" should be determined by reference to the going market rate for lawyers with comparable qualifications and experience. By 1978, the agency had had some second thoughts about its interpretation of the statue, and it requested a ruling from the Comptroller General.[253] The result was a determination that the FTC's initial interpretation had been correct: granting compensation above the fee actually incurred "would represent a Federal subsidy to an interest group, and the Commission may not use its appropriations for such a purpose without statutory authority."[254]

A similar problem arose with respect to the maximum fees payable to "outside counsel" because there was also a substantial variance between the going market rate charged by private lawyers representing business interests, and the fees charged by "private public interest law firms" which frequently were retained by successful compensation applications. Here, the

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[251] *E.g.*, Interview with Irmgard Hunt, Consumer Action Now Council on Environmental Alternatives, April 6, 1979; Interview with Robert Choate, Council on Children, Media and Merchandising, March 23, 1979; Interview with Dennis Kavenagh, Golden State Mobilhome Owners' League, March 28, 1979; Interview with John Pound, San Francisco Consumer Action, August 2, 1976.

[252] 15 U.S.C. § 57a(h) (1) (1976).

[253] Letter from Michael Pertschuk, Chairman, FTC, to Elmer B. Staats, Comptroller General of the United States, April 11, 1978.

[254] Opinion of the Comptroller General B-139703, July 31, 1973, at 4.

Commission consistently took the position that maximum fees should be set below the general market rate, but it had considerable difficulty determining what that lower maximum fee schedule should be. After some initial false starts, the Commission eventually settled on a fee scale extrapolated from government lawyers' salaries, which had sliding maximum limits based on the attorney's years of experience after law school.[255] This position was also criticized by representatives of the public interest bar, who complained that the FTC's scale gave inadequate recognition to the limited number of billable hours which most public interest lawyers accumulated and the relatively high overhead costs many of them incurred.[256] This shifted the focus of the dispute to overhead computations, and the question of allowable overhead rates proved to be a surprisingly difficult matter to resolve. Part of the problem was that the FTC was dealing with a heterogeneous collection of organizations, ranging from small shoestring operations with minimal staffs and rudimentary accounting practices to sophisticated and experienced entities with annual budgets totalling several million dollars. Thus, there was likely to be a tremendous variance both in the percentage of actual overhead expenses the group would incur while participating in a TRR proceeding, and in the ability of the group to present a detailed justification of its overhead costs. The 1977 Guidelines hedged on the overhead question by essentially providing three ways an applicant could compute overhead. If the organization had an audited rate established by the GAO, it could apply that overhead rate; alternatively, the group could use a flat rate of 25% of employee salaries (excluding secretarial), or it could justify a different overhead rate.[257] By mid-1979, the FTC was reportedly re-examining this rather cumbersome approach to the overhead issue.

F. Audit and Quality Control

Since a compensation program like the FTC's disburses substantial amounts of public funds, there must be some follow-up capability to make sure that the money is being properly used. Functionally, this follow-up work can be divided into two related operations: auditing, to assure that claims for reimbursement are consistent with the relevant standards and supported by adequate documentation; and monitoring or quality control, to make sure that the compensated groups are actually performing the work they have undertaken in a competent fashion. These checking activities can also help to expose problems in the content or application of funding criteria, and suggest areas where the compensation standards need improvement. The FTC's experience also indicates that audit and quality control capability should be an integral part of the compensation program from the outset, so that reviews can be completed while the information is still fresh and the results still useful for avoiding future problems or mistakes. Here, as in other areas of the compensation program, lack of resources and inertia delayed the development of a workable system of administration. As a result, no audits were completed until several years after the compensation program began functioning. By that time some groups who were the targets of this first round of audits complained, with some justification, that they were being evaluated by standards of recordkeeping and use of compensation funds that had not been made clear to them, or indeed may not have existed when the compensation program first came into existence.[258]

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[255] *See* 1977 Guidelines, 42 F.R. 30485 (June 14, 1977) (maximum hourly rate of $42/hour for attorney with more than 5 years' experience).

[256] *E.g.*, Observation Report of Meeting Between FTC Staff and Representatives of the Council for Public Interest Law, April 30, 1976.

[257] 42 F.R. 30485 (June 14, 1977).

By the fall of 1976, when the first big group of Magnuson-Moss proceedings had moved into hearing, FTC officials administering the compensation program were aware of the need to develop some systematic method for checking up on the performance and reimbursement claims of compensated groups.[259] Early in 1977, in preparation for congressional hearings, the Commission's Special Assistant for Compensation sought evaluations from the rulemaking staffs and Presiding Officers of the work done and contributions to the proceeding made by compensated participants.[260] The results of this internal survey, which were generally favorable to the compensated groups, were presented to Congress in hearings held during the spring of 1977. At these hearings, FTC officials also announced their intention to begin audits of groups which had received compensation, and they sought additional funding for audit personnel.[261] Audits did begin shortly thereafter,[262] but the first audit was not completed until spring of the following year.[263] It was almost another year—February of 1979—until an auditor was assigned to work full time on the Magnuson-Moss compensation program.[264]

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[258] *E.g.,* Letter from David A. Swankin, Swankin & Turner, to Margery Waxman Smith, Executive Director, Federal Trade Commission, November 30, 1978, at 2 (appealing in part disallowances of expenses in audit of Consumer Action, Inc., National Consumers Congress, Automobile Owners Action Council, and National Consumers League); Confidential FTC Document 29.

[259] Interview with Bonnie J. Naradzay, Special Assistant for Compensation, FTC, October 19, 1976.

[260] *E.g.,* Confidential FTC Documents 30-31.

[261] *E.g., Hearings on H.R. 3361 and Related Bills Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 95th Cong. 1st Sess. 520 (1977) (statement of Margery Waxman Smith, Acting Director, Bureau of Consumer Protection, Federal Trade Commission):

> As the Comptroller General made clear three months ago, many Federal agencies, especially the smaller ones, lack adequate audit capability. A public participation program will automatically create a need for auditing and monitoring that agencies will have difficulty providing. . . . [Recipient groups] will need technical help, for their own sake, and careful monitoring, for the government's. Whatever the final structure of any program enacted by Congress, the necessary administrative infrastructure should be created concurrently.

See also id. at 531 (next fiscal year's budget includes request for additional fiscal officer to audit compensation awards; agency intends to perform field audits of recipients).

As the Commission developed audit capability, it began to codify and elaborate its rules for assuring financial accountability. While the original rules of practice[265] and the early action letters on applications[266] were generally vague and conclusory about the recipient's responsibility to maintain suitable records, the 1977 Guidelines spelled out the requirement at some length. Recipients were directed to keep "all records relating to the receipt and expenditure of FTC compensation award funds and to the expenditure of the participant's contributed share of the cost of a project" for at least three years.[267] Applicants were also advised of the procedures for appealing an adverse audit report,[268] and they were informed that if they received funding, "the presiding officer will be asked afterward to comment on the quality of your work. He will also report on his estimation of the appropriateness of your claimed expenditures in terms of your contribution to the proceeding."[269] Internal procedures were also regularized, and written guidelines for audit personnel were developed in April of 1979 to meet the special needs of the Magnuson-Moss funding program.[270]

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[262] Interview with Robert Walton, Deputy Director, Division of Budget and Finance, FTC, July 20, 1979.

[263] Confidential FTC Document 32.

[264] Interview with Robert Walton, *supra* note 262.

[265] The original rules of practice contained only the following paragraph relating to this topic:

> The Commission will compensate the applicant only for those authorized expenses actually incurred. Appropriate proof of actual expenditures may be required by the Commission. . . . Payment will be conditioned upon the execution by the applicant of an appropriate agreement setting forth the terms and conditions of the compensation.

16 C.F.R § 1.17(e) (1978). The suggestion in the latter sentence that the recipient's obligations would be specified in contractual form was never carried out; rather, the application itself, and the FTC's "action letter," constituted the specification of activities that had been approved for funding.

[266] *E.g.*, Action Letter on Application of San Francisco Consumer Action in Vocational Schools Proceeding, October 24, 1975, at 2. This letter, following the general format of early action letters, simply advises the applicant:

> The amounts claimed for actual reimbursement could be subject to final audit for reasonableness and conformance to federal regulations by the Federal Trade Commission and the General Accounting Office.

[267] 42 F.R. 30484 (June 14, 1977).

[268] *Id.* (written appeal must be filed with Director of Bureau of Consumer Protection within 30 days). After the transfer of control over the compensation program to the General Counsel's Office, the appeal is taken to the FTC's Executive Director. Walton Interview, *supra.*

[269] *Id.*

[270] Division of Budget and Finance, FTC Rulemaking Program Generalized Audit Guide (April 1979) (unpublished intra-agency document).

The first wave of field audits conducted under the compensation program resulted in the disallowance of a number of items that had previously been reimbursed, and some funds were recovered as a result.[271] According to the Deputy Director of the FTC's Division of Budget and Finance, the rate of disallowance in the rulemaking compensation program was generally consistent with auditors' findings in other program areas, and is largely attributable to the rudimentary accounting systems used by volunteer consumer groups.[272] When disputes over disallowances did occur, they often concerned technical matters such as the definition of cost of participating,[273] or computation of allowable overhead.[274] In mid-1979, these disputes were reportedly causing the FTC to re-examine the portions of the Guidelines relating to overhead.[275]

While the financial auditing aspects of the FTC's compensation program appeared to be fairly well established by the middle of 1979, the quality control function seemed more problematic. The approach taken in the 1977 Guidelines, which gave the Presiding Officers the responsibility for reporting on the quality of work done by compensation recipients, may have been the best available choice: the Presiding Officer is familiar with the conduct of the particular proceeding, and he is cast in a more neutral role than the staff attorneys assigned to the rule. However, it is not clear that the Presiding Officer's training or experience would give him any basis on which to determine whether, for example, the number of hours that a compensated participant billed for preparation for cross-examination was reasonable. A more fundamental problem, discussed in the following section, is that attempts to assess the quality and impact of the compensated groups' participation are difficult at best, and usually involve a large element of subjective judgment. Thus, it is not clear whether the Presiding

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[271] Interview with Robert Walton, *supra* note 262.

[272] *Id.*

[273] In one instance, a recipient organization was granted reimbursement for consultant services, then asked to repay the money when an audit revealed that the consultant had not been paid. The recipient group took the position that the consultant had decided to donate his services to the organization, and that the economic effect of the transaction was, for the FTC's purposes, the same as if the consultant had been paid and then had made an equivalent cash donation to the group. The FTC denied reimbursement on the ground that there was no real cost to the organization when they had not been billed for or paid the fee. Confidential FTC Document 33.

[274] One law firm appealed disallowance of overhead expenses for one of the temporary personnel it had hired for a particular proceeding. The ground for the denial was that the person was an independent contractor rather than an employee whose salary could be included in the overhead computation. The firm had argued that its relationship to the person was functionally similar to other temporary employees they had added for TRR proceedings, and that if they had known of the FTC's strict interpretation the firm could and would have structured this relationship as employer-employee rather than independent contractor. The FTC denied the appeal. Confidential FTC Documents 34, 35.

[275] Interview with Robert Walton, *supra* note 262.

Officer's evaluations will give the agency an accurate or consistent understanding of the compensated participants' contributions—or indeed whether any feasible quality control systems could fully meet this objective.

APPENDICES

Appendix A[8]

TABULAR SUMMARY OF COMPENSATION REQUESTS AND AUTHORIZATIONS

Introductory Notes

The following tables are arranged by rulemaking proceedings, in the order in which proceedings reached the hearing stage under the Magnuson-Moss Act. The sequence is as follows:

1. Vocational Schools—December 1, 1975
2. Prescription Drugs—December 1, 1975
3. Holder-in-Due-Course—April 5, 1976
4. Hearing Aids—April 12, 1976
5. Funeral Practices—April 19, 1976
6. Protein Supplements—May 10, 1976
7. Ophthalmic Goods—June 7, 1976
8. Food Advertising—July 12, 1976
9. Care Labeling—November 8, 1976
10. Used Cars—December 6, 1976.
11. OTC Drugs—February 28, 1977
12. Credit Practices—September 12, 1977
13. Health Spas—September 15, 1977
14. Mobile Homes—October 11, 1977
15. Thermal Insulation (R-Value)—February 13, 1978
16. OTC Antacids—December 4, 1978
17. Children's Advertising—January 15, 1979

Within each rulemaking proceeding, the applicants are arranged in alphabetical order.

The tables reflect information available at the FTC as of January 31, 1979. We have relied upon the figures used by the applicants and the FTC (even though these groups occasionally made errors in their calculations). Group totals that may be artificially inflated because of resubmissions are marked with an asterisk. Applications that were withdrawn or amended before the FTC acted upon them are not listed *unless* the withdrawn application was the only application filed by the group in that proceeding.

The following shorthand references are used in the column captioned "Proposed Activities":

Pre-Hearing Comments

Prepare and submit written comments during the first public comment period, which commences with the publication of Initial Notice and ends 45 days before hearing.

Testimony

All activities associated with presenting witness testimony at the public hearings, including conducting surveys or studies, locating and compensating witnesses, preparing witnesses, and the like.

Group Representative

Having a lawyer or other representative designated by the Presiding Officer as an interest-group representative who is entitled to conduct examination and cross-examination of witnesses at the hearings.

Rebuttal

All activities connected with preparing and submitting rebuttal evidence after the conclusion of the public hearings (includes review of transcripts, procurement of expert and attorney services, other miscellaneous expenses).

Post-Record Comments

All activities associated with preparing and submitting comments on the Presiding Officer's and Staff's reports during the second public comment period.

Oral Presentation to the Commission

All activities associated with participation in oral presentations to the full Commission following the second public comment period.

VOCATIONAL SCHOOLS

Applicant	Date of Application	Proposed Activities	Request	Authorization
Consumer Action—San Francisco (SFCA)	First Application (9/19/75)	Testimony: review complaint files; test shopping; interviews with school officials; analysis of performance of state and federal regulatory agencies. Serve as group representative at San Francisco hearings.	$19,176	$ 7,060 (denied test shopping)
	Second Application (10/29/75)	Modify study to replace test shopping with interviews of vocational school students.	13,178	12,960
	Third Application (11/7/75)	Serve as group representative at Los Angeles hearings.	4,995	4,995
	Fourth Application (1/19/76)	Overrun	436	436
	Fifth Application (1/20/76)	Overrun	5,268	3,107
	Sixth Application (1/4/78)	Oral presentation to the Commission.	3,063	705 (reduced number of hours for preparation; personnel substitution hourly rate)
			$45,898*	$29,263
John C. Hendrickson, Attorney, Illinois	7/15/76	Submit post-record comments (to replace Joel Platt).	$ 3,099	None
National Consumer Law Center, Inc. (NCLC), Massachusetts	12/20/77	Oral presentation to the Commission.	$ 2,474.25	$ 2,474.25

VOCATIONAL SCHOOLS—Continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
Joel Platt, Chief Legal Counsel in the Illinois Governor's Consumer Advocate Office	11/28/75	Serve as group representative at Chicago hearings. Mobilize witnesses.	$ 9,987	$ 5,460 (reduced hourly rate and number of hours allowed for research and secretarial assistance)
San Francisco Regional Office of the FTC	11/7/75	Testimony: four witnesses (expert and consumer).	$ 789.47	None
Mary Anne Vance, Staff Attorney, Consumer Advocate Office, State of Illinois	7/26/76	Submit post-record comments (to replace Joel Platt).	Not Stated	Request Withdrawn
Len Vincent, Former investigator with the Baton Rouge Consumer Protection Center, Louisiana	10/14/75	Testimony	$ 135	None
Total authorization for vocational schools:				$37,197.25

PRESCRIPTION DRUGS

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA), Washington, D.C.	11/6/75	Testimony: experts, managers of pharmacies, and lawyer; surveys and investigations of drug price disclosures in the D.C. area. Submit post-record comments	$14,558	None
Consumer Action — San Francisco (SFCA)	11/4/75	Testimony: update prior study of price disclosures. Have representative present at hearings to submit questions to be asked by the Presiding Officer. Submit rebuttal.	$16,100	None
Consumer Newsletter California	11/8/75	Testimony	$ 100	None
Consumers Union of United States, Inc. (West Coast Regional Office) (CU), California	10/24/75	Testimony: prior involvement in prescription drug pricing.	$ 944.30	None
National Association of Mail Service Pharmacies Craig W. Sandahl), Washington, D.C.	12/5/75	Travel expenses to testify at hearings.	$ 90.23	None
National Council of Senior Citizens, Inc. (NCSC) Washington, D.C.	12/3/75	Testimony: economist, lawyer, and advertising expert.	$ 9,227	$ 2,070 (reduced number of hours allowed for attorneys and expert witnesses)
Total authorization for prescription drugs:				$ 2,070.00

Holder-In-Due-Course

Applicant	Date of Application	Proposed Activities	Request	Authorization
Professor Richard A. Hesse, Franklin Pierce Law Center, New Hampshire	3/3/76	Testimony	Not Stated (estimated by FTC at $150)	None
Professor Richard S. Kay, School of Law, University of Connecticut	2/26/76	Testimony	$ 125	None
National Consumer Law Center, Inc. (NCLC), Massachusetts	3/9/76 and 3/20/76	Testimony: legal services attorneys. Serve as group representative.	$ 3,193.65	$ 3,093.25
David A. Scholl, Executive Director, Delaware County Legal Assistance, Association, Inc., Pennsylvania	2/18/76	Testimony	$ 28	No Record Found
Richard A. Victor, Assistant Attorney General, Office of Consumer Protection, Wisconsin Department of Justice	2/26/76	Testimony	$ 250	None
Total authorization for holder-in-due-course:				$ 3,093.25

HEARING AIDS

Applicant	Date of Application	Proposed Activities	Request	Authorization
California Citizen Action Group (CalCAG)	6/1/76	Testimony: adequacy of state board's handling of consumer complaints and state board's efforts in consumer education.	$ 3,665	Request Withdrawn
Consumer Association of Kentucky (C.A.K.)	2/19/76	Testimony: expert and an attorney.	$ 2,856.92 (for one day's participation)	None
National Council of Senior Citizens, Inc. (NCSC), Washington, D.C.	First Application (1/30/76)	Testimony: consumers and experts. Serve as group representative at Washington, D.C. hearing. Submit post-record comments.	$34,926.00	$36,006.00
	Second Application (3/15/76)	Continue representation at final week of D.C. hearings and serve as group representative at Chicago and San Francisco hearings.	8,100.00	8,100.00
	Third Application (9/14/77)	Additional costs for post-record comments.	2,681.38	2,628.13
			$45,707.38	$46,734.13
National Hearing Aid Society (NHAS), Michigan	First Application (4/12/76 and 5/4/76)	Testimony: survey of hearing aid dealers to asses economic impact of the rule on consumers and dealers. Attorneys' fees to continue group representation for dealers.	$ 68,249.00	$34,364.00 (NHAS could not use these funds because of a successful solicitation that it sent to its members)
	Second Application (9/22/77)	Submit post-record comments.	35,636.60	33,495.80
	Third Application (4/11/78)	Additional time needed to do post-record comments.	15,651.00	15,651.00
			$119,263.60*	$83,510.80
New York League for the Hard of Hearing	6/3/76	Testimony: survey on effectiveness of notice of buyer's right to cancel under the proposed rule.	$ 5,500	None
Total authorization for hearing aids:				$130,244.93

Funeral Practices

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA) *and* National Council of Senior Citizens, Inc. (NCSC), Washington, D.C.	First Application (2/23/76)	Testimony: consumers, labor union representative (who pays death benefits), economics (on structure of industry and effect of rule), and lawyer (on constitutional and ethical dimensions). Serve as group representative at D.C. hearings. Submit rebuttal and post-record comments.	$13,138.00	$ 8,315.00 (reduced attorney fees)
	Second Application (5/6/76)	Travel related to expert testimony (omitted from original application).	528.00	528.00
	Third Application (6/7/76)	Serve as group representative at the Chicago hearings (cost already incurred). Additional costs because underestimated length of D.C. hearings.	9,296.17	9,236.17
	Fourth Application (9/7/76 and 9/8/76)	Extend rebuttal and post-record comments to cover entire record of proceeding.	11,298.81	None
	Fifth Application (9/15/77)	Convene a meeting of all six consumer representatives. Prepare a final comment from the six consumer representatives.	28,781.00	27,483.00
	Sixth Application 7/14/78)	Additional costs to respond to the issues raised in the Staff Report.	5,968.00	6,254.00
	Seventh Application (10/18/78)	Overrun: cost of microfilm reader/printer machine was more than expected.	586.75	598.18
			$69,596.73	$57,474.35
Arkansas Community Organizations for Reform Now (ACORN)	4/2/76	Testimony: survey funeral homes in Arkansas to identify unfair trade practices; an internal survey ACORN membership for consumer desires and preferences.	$ 2,480.00	No Record Found

Arkansas Consumer Research (ACR)	First Application (5/12/76)	Testimony: consumers and expert in state regulation. Serve as group representative at Atlanta hearings. Submit rebuttal.	$ 7,676.00	$ 6,653.00 (reduced attorney and witness fees)
	Second Application (5/27/76)	Witness transportaion and per diem expenses omitted from original budget.	666.00	666.00
	Third Application	Purchase transcripts of Atlanta hearing for use in rebuttal	375.00	375.00
	Fourth Application (10/25/76)	Overrun	80.79	80.79
			$ 8,797.79	$ 7,774.79
California Citizen Action Group (CalCAG)	First Application (4/16/76)	Testimony: survey of recent purchasers of funeral services; present testimony of consumers, ministers, etc., who have experience with the bereaved.	$13,610.00	$12,658.00
	Second Application (5/4/76)	Errors in proposal of 4/16/76 and fact that hearings will run longer than expected necessitate revision of authorized budget.	13,441.00	New Total: 13,548.00
	Third Application (6/23/76)	Overrun: additional costs because hearings ran longer than expected.	2,657.41	1,650.41
	Fourth Application (6/23/76 and 7/20/76)	Submit rebuttal.	360.00	360.00
	Fifth Application (9/13/77)	Submit post-record comments.	8,758.00	8,210.00
	Sixth Application (6/30/78)	Additional costs for post-record comments.	3,120.00	3,120.00
			$41,946.41*	$26,880.41
Central Area Motivation Program (CAMP) Washington State	First Application (4/5/76)	Testimony: survey of recent purchasers of funerals; attitude survey of general public; interviews with senior citizens; survey of state laws. Serve as group representative. Submit rebuttal.	$ 9,792	None

FUNERAL PRACTICES—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Second Application (4/26/76)	Revises proposal of 4/5/76 to make to more specific; will limit focus to greater metropolitan area of Seattle.	8,411	7,410
			$18,203*	$ 7,410
Consumer Federation of America (CFA) Washington, D.C.	12/31/75	Testimony: survey of consumers regarding practices covered by the rule; analysis of existing state law; consumer and expert witnesses.	$26,024.50	$11,328.50 (CFA refused because attorney compensation rates thought to be inadequate and because of possible conflict of interest)
Consumers Union of United States, Inc. (CU) Washington, D.C.	10/28/75	Submit pre-hearing comments.	$ 3,830.70	$ 3,980.00
Continental Association of Funeral and Memorial Societies, Inc. (CAFMS)	First Application (2/23/76 and 2/24/76)	Testimony: survey of consumers and funeral homes; experts in economics and consumer behavior. Serve as group representative at all of the hearings. Submit rebuttal.	$24,080	$12,670 (denied funds for group representation)
Washington, D.C.	Second Application (5/27/76)	Purchase hearing transcripts.	4,500	4,500
	Third Application (7/15/76)	Additional attorney time for extra week of Washington hearings; costs for additional out-of-town witnesses.	Not Stated	$ 1,000

	Fourth Application (8/23/76)	Additional time for rebuttal. Submit post-record comments.	19,040	None
			$47,620	$18,170
Cremation Association of North America (CANA) California	First Application (12/28/76)	Submit post-record comments.	$12,900	None
	Second Application (9/23/77 and 6/28/78)	Submit post-record comments.	8,845	3,414
			$21,745*	$ 3,414
Michael Hirsh, Executive Producer for Public Chicago Public Television Illinois	2/23/76	Consumer representative (activities unclear; evidently group representative).	Not Stated	None
Minnesota Memorial Society (MMS)	4/6/76	Testimony: board member of Minnesota Memorial Society.	$ 112	None
New York Public Interest Research Group, Inc. (NYPIRG)	First Application (2/22/76)	Testimony: surveys of consumer experience in arranging funerals; literature search and interviews regarding impact of price itemization on the funeral industry; suvery of state regulations regarding use of display coffins and burial in inexpensive containers; price utilization study. Serve as group representative at New York hearings. Submit revbuttal.	$ 8,557.00	$8,377.00
	Second Application (5/25/76)	Overrun: underestimated costs for group representation. Delete rebuttal participation.	3,240.00	$ 3,363.00
	Third Application (12/5/78)	Oral presentation to the Commission.	443.60	Pending
			$12,240.60	$11,740.00

Funeral Practices—Continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
Pre-Arrangement Interment Association of America (PIAA), Virginia	First Application (12/7/76)	Submit rebuttal and post-record comments.	$23,540.00	None
	Second Application (9/23/77 and 6/28/78)	Submit post-record comments.	14,772.50	$ 4,059.00
			$38,312.50*	$ 4,059.00
Total authorization for funeral practices:				$152,239.05

Protein Supplements

Applicant	Date of Application	Proposed Activities	Request	Authorization
Consumer Action—San Francisco (SFCA)	4/7/76	Testimony: questionnaire and interviews of potential users of protein supplements; cost of protein supplements compared to alternative protein sources; consumer testimony. Serve as group representative at San Francisco hearings.	$15,128	$15,507
Consumer Action Now's Council on Environmental Alternatives (CAN), New York	First Application (5/26/76)	Testimony: review relevant medical literature; analyze protein supplement information in sources other than ads; survey protein supplement outlets to determine information and attitudes communicated to consumers; demographic analysis of protein supplement users.	$12,730.00	$12,710.00
	Second Application (9/17/76)	Overrun: unanticipated expenses in connection with D.C. hearings	No Record Found	1,245.60
			$12,730.00	$13,955.60
Consumers Cooperative of Berkeley, Inc. California	First Application (2/4/76)	Testimony: in-store survey of consumer understanding of nutritional concepts used in regulation; comparative cost of protein in supplements vs. other products.	$ 3,507.00	$ 3,607.00
	Second Application (10/2/76 and 11/5/76)	Overrun: additional costs in preparing testimony.	No Record Found	360.70
			$ 3,507.00	$ 3,967.70
Chester W. Sutton (Sponsored by the Save the United States Movement, Washington, D.C.), North Carolina	6/15/76	Testimony: personal experiences recovering from cancer.	$ 300	None
Total authorization or protein supplements:				$33,430.30

OPHTHALMIC GOODS

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA) Washington, D.C.	First Application (5/27/76)	Serve as group representative at D.C. and Cleveland hearings. Submit rebuttal.	$11,322.00	$ 6,652.00 (reduced number of hours allowed; denied rebuttal)
	Second Application (6/16/76)	Testimony: survey extent to which price information is available by phone; compare quoted prices with actual prices; assess correlation of price and quality with nature of provider.	6,280.00	None
	Third Application (8/13/76)	Serve as group representative at extended D.C. hearings. Analyze Supreme Court's *Virginia Pharmacy* decision.	2,855.00	2,855.00
	Fourth Application (3/10/77)	Submit post-record comments: bring all consumer representatives together to develop a position based on the whole record.	9,778.00	9,766.00
	Fifth Application (5/25/77)	Additional costs to prepare post-record comments for ADA and CalCAG.	1,933.00	2,372.00
	Sixth Application (8/3/77 and 8/8/77)	Additional costs to prepare post-record comments.	1,290.00	1,290.00
	Seventh Application (11/18/77)	Overruns because of new rate structure and underestimates of attorney and para-legal time.	6,035.70	5,365.33
	Eighth Application (11/26/77)	Oral presentation to the Commission.	1,902.00	1,902.00
			$41,395.70	$30,202.33
Arkansas Community Organizations for Reform Now (ACORN)	First Application (4/30/76)	Testimony: consumers and others. Serve as group representatives at Dallas hearings.	$ 1,962.00	$ 1,828.00

	Second Application (8/6/76)	Additional attorney time because hearings will run longer than expected.	840.00	No Record Found (but see overrun authorization below)
	Third Application (8/14/76)	Serve as group representative at D.C. hearings.	770.00	None
	Fourth Application (8/19/76)	Overrun	144.67	984.67
			$ 3,716.67	$ 2,812.67
California Citizen Action Group (CalCAG)	First Application (4/16/76 and 4/30/76)	Testimony: consumer information survey relating to adequacy of existing information disclosures, importance of price to consumers, special needs of elderly and Spanish-speaking, and need for copy of prescription; performance, composition, and attitudes of state regulatory boards and professional associations. Serve as group representative with SFCA at San Francisco hearings.	$31,992.00	$33,372.00
	Second Application (7/21/76)	Overhead costs omitted from original budget.	850.00	850.00
	Third Application (7/31/76)	Serve as group representative at D.C. hearings. Additional expert witness costs. Submit rebuttal.	3,582.00	545.00 (rebuttal only)
	Fourth Application (11/18/77)	Oral presentation to the Commission.	5,813.00	3,518.00 (reduced number of hours allowed; denied contract management)
	Fifth Application (1/4/78)	Overrun	5.30	No Record Found
			$42,242.30	$38,285.00

Ophthalmic Goods—Continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
Consumer Action—San Francisco (SFCA)	First Application (4/15/76)	Testimony: "consumer impact study" to compare consumer price awareness in California and Arizona; economic effect of price advertising on retailers; study quality of ophthalmic goods and services sold in Arizona. Serve as group representative at San Francisco hearings. Submit rebuttal.	$38,630.00	$37,766.00
	Second Application (5/28/76)	Rental cars	216.00	216.00
	Third Application (6/19/76)	Rental cars, telephone, printing costs and-researcher time associated with field research.	1,604.00	1,604.00
	Fourth Application (8/4/76)	Preparation for and attendance at D.C. hearing.	4,250.00	No Record Found
	Fifth Application (9/18/76)	Overruns associated with preparation for and attendance at D.C. hearing.	5,324.58	3,958.60
	Sixth Application (11/8/76)	Request for reconsideration of balance of fifth application.	1,527.98	None
			$51,552.56*	$43,544.60
New York Public Interest Research Group, Inc. (NYPIRG)	5/14/76	Testimony: legal expert who is a consumer advocate. Legal and economic research in preparation for cross-examination. Serve as group representative at New York hearings. Submit rebuttal.	$12,665	$12,575
United Consumers of the Alleghenies, Inc. (U.C.A.), Pennsylvania	6/17/76	Testimony: evidently personal experiences.	$ 253.20	No Record Found
Total authorization for ophthalmic goods.				$127,419.60

FOOD ADVERTISING

Applicant	Date of Application	Proposed Activities	Request	Authorization
Connecticut Citizen Research Group (CCRG)	8/13/76	Testimony: surveys to test consumer understanding of terms used in the rule.	$ 8,242.60	$ 6,777.00 (denied literature survey)
Consumer Action—Washington, D.C. (DCCA)	First Application (Undated)	Serve as group representative for all of the hearings.	$46,990	$38,158 (reduced attorney fees and number of hours allowed)
	Second Application (8/24/76 and 10/5/76)	Testimony: linguistic analysis of words such as "natural", "organic", and "health foods"; analysis of the constitutional and social policy implications of the ban on use of terms "organic", "natural", etc.; expert testimony of two nutritionists.	10,912	2,746 (constitutional and policy analysis denied; linguistic analysis limited)
	Third Application (10/5/76)	Additional preparation and hearing time for attorneys. Submit rebuttal.	14,915	5,940 (denied preparation time for associate attorney; deferred decision on rebuttal)
			$86,781*	$46,844
Consumers Union of United States, Inc. (CU) Washington, D.C.	First Application (9/23/75 and 1/16/76)	Submit pre-hearing comments.	$ 8,793.20	$ 5,760.00
	Second Application (2/20/76)	Revision of the rate of compensation for attorneys set forth in the FTC budget.		New Total: 7,360.00
			$ 8,793.20	$ 7,360.00

FOOD ADVERTISING—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
Council on Children, Media and Merchandising (CCMM) Washington, D.C.	First Application (5/10/76)	Testimony: conduct literature review "complemented by field tests where necessary" on children's understanding of advertising claims; "focus group analysis" of children's reactions to advertising. Serve as group representative.	$52,400.00	$51,267.00
	Second Application (11/5/76)	Continue participation (hearings ran longer than anticipated). Submit rebuttal and post-record comments.	9,895.28	6,709.78 (deferred decisions on rebuttal, post-record comments and the funding of aides)
	Third Application (12/8/76)	Resubmission of request for funding of aides.	1,000.00	1,000.00
	Fourth Application (12/22/76)	Overhead for aides.	300.00	300.00
	Fifth Application (12/1/78)	Submit post-record comments.	3,158.00	3,158.00
			$66,753.28*	$62,434.78
Wendy Gardner (Home Economist, Consumers, Cooperative of Berkeley, Inc.)	3/30/76	Testimony	$ 295	$ 295
Indiana Home Economics Association	8/30/76 and 9/6/76	Testimony. Serve as group representative at Chicago hearings.	$ 39.70	$ 39.70 (testimony only)
Iowa Consumers League (ICL)	3/22/76 and 8/26/76	Testimony. Cross-examination.	$ 173	$ 200 (testimony only)

Sidney Margolius	No Record Found	Testimony: updating prior research on health foods.	$ 1,043	No Record Found
National Consumers Congress, Inc. (NCC), Washington, D.C.	5/11/76	Testimony: survey consumers regarding their understanding of the terms "natural" and "organic".	$ 7,334	$ 9,295
The National Health Federation, California	3/23/76, 4/30/76 and 9/3/76	Testimony: expert witnesses. Cross-examination. Submit rebuttal.	$50,000	None
Mary Ruth Nelson (Home Economist, Consumers Cooperative of Berkely, Inc.), California	3/31/76	Testimony: research. Serve as group representative.	$ 270	$ 270 (testimony only)
Kurt A. Oster, M.D. Connecticut	8/16/76 and 10/2/76	Testimony: research on milk enzymes.	Not Stated (travel and hotel)	None
Society for Nutrition Education (SNE), California	First Application (6/9/76 and 6/14/76)	Testimony: review nutrient composition data for foods considered good nutrient sources and compare with treatment under proposed rule; analyze whether rule is likely to suppress nutrition ads or or lead to a "fortification race"; try to develop alternative definitions of "nutritious"; review alternative forms of protein advertisements.	$21,228	$18,904 (denied a "contingency" category of 10% of the request)
	Second Application (7/27/76)	Indirect costs not covered in first application.	1,956	1,956
			$23,184	$20,860
Spanish Speaking/Surnamed Political Association, Inc. California	3/30/76	Testimony: translators, legal fees, preparation of witnesses and research.	$ 2,850	None
Utah State University Faculty Members	6/21/76	Testimony: perform detailed analysis of traditional foods to compute an Index of Nutritional Quality reflecting nutrient density.	$28,940	No Record Found
Total authorization for Food Advertising:				$154,375.48

CARE LABELING

Applicant	Date of Application	Proposed Activities	Request	Authorization
Seymore Goldwasser (Consultant in the area of textiles and detergents), New Jersey	9/19/76	"Technical representation" for the consumer.	Not Stated	None
National Consumers Congress (NCC merged into the National Consumers League on 6/27/77), Washington, D.C.	First Application (11/9/76)	Testimony: survey of consumer experience with care instructions and reactions to glossary of care terms; survey of commercial cleaners regarding their experience with care labeling and responses to instructions. Serve as group representative.	$48,498.67	$47,352.67
	Second Application (6/23/78)	Submit post-record comments.	9,940.00	9,940.00
			$58,438.67	$57,292.67
Total authorization for care labeling:				$57,292.67

USED CARS

Applicant	Date of Application	Proposed Activities	Request	Authorization
Automobile Owners Action Council (AOAC), Washington, D.C.	First Application (Undated; received 5/18/76)	Testimony: review complaint files; undertake study in which used car dealers voluntarily adopt proposed rule's requirements; develop economic model; assist other consumer groups in preparing testimony. Serve as group representative at D.C. hearings.	$31,000.00	$ 7,300.00 (approves only AOAC's testimony based on complaint files)
	Second Application (9/20/76)	Serve as group representative at Boston, Cleveland and D.C. hearings.	22,790.00	16,960.00 (reduced number of hours allowed for associate attorneys)
	Third Application (5/23/77)	Overrun: additional expenses because of development of alternative rule.	12,574.90	432.00
	Fourth Application (11/15/78)	Submit post-record comments with CalPIRG and SFCA.	10,355.00	5,475.00 (reduced number of hours allowed)
			$76,719.90*	$30,167.00
California Public Interest Research Group, Inc. (CalPIRG)	First Application (10/1/76 and 10/21/76)	Testimony: test shopping to see what disclosures are made; diagnostic tests and re-shopping for faulty cars; search of public record sources to seek background information on cars involved in test shopping; telephone survey of consumer attitudes toward used car dealers. Serve as group representative at Los Angeles hearings.	$43,574.00	$37,988.68 (reduced hourly rates for attorneys and the number of hours allowed for attorneys and paralegals)
	Second Application (telephone call on 12/27/76)	Transcripts and other miscellaneous costs of participation.	No Record Found	595.00

USED CARS—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Third Application (3/5/77)	Serve as co-group representative at D.C. hearings.	4,828.00	None
	Fourth Application - joint application from CalPIRG and SFCA (11/15/78)	Submit post-record comments with AOAC.	15,736.00**	7,770.00** (reduced number of professional hours allowed)
			$64,138.00	$46,353.68
Center for Auto Safety (CFAS) *and* Americans for Democratic Action - Consumer Affairs Committee (ADA), Washington, D.C.	First Application (11/5/76)	Testimony: review complaint files; survey disclosure practices of used car dealers; study Department of Transportation recalls to determine how many safety-related defects remain uncorrected and are passed on to used car buyers. Serve as group representative at all of the hearings.	$63,205.00	$ 4,500.00 (only approved dealer survey)
	Second Application (5/17/77)	Overrun: additional cost in preparing and presenting testimony.	774.59	774.59
	Third Application (10/24/78)	Submit post-record comments.	4,030.00	4,030.00
			$68,009.59	$ 9,304.59
Center for Public Representation (CPR), Wisconsin	8/23/76	Testimony: study the impact of rules promulgated by Wisconsin's Department of Transportation.	$33,188	$33,146
Consumer Action—San Francisco (SFCA)	First Application (10/3/76)	Serve as group representative at Dallas and San Francisco hearings.	$21,434.00	$10,976.52 (denied bookkeeping costs; reduced number of hours allowed for attorneys and paralegals)

	Second Application (telephone call on 12/27/76	Transcripts and other miscellaneous costs of participation.	No Record Found	775.00
	Third Application - joint application from CalPIRG and SFCA (11/15/78)	Submit post-record comments with AOAC.	15,736.00**	7,770.00** (reduced number of professional hours allowed
			$37,170.00	$19,521.52
Used Motor Vehicle Study Team, California	7/19/76	Testimony: test shopping to see what disclosures are made, including diagnostic inspections and reshopping for vehicles with defects; search public records and interview prior owners to see what information was available to dealers on cars involved in test shopping; cooperating with dealers to undertake a ''test run'' of the proposed rule.	$63,046	None
Total authorization for used cars:				$130,722.79

** This was a joint request and a joint authorization for CalPIRG and SFCA. The request figure and the authorization figure appear twice in this chart. In fact, however, these amounts were requested and authorized only once. For this reason, the request and authorization totals for CalPIRG and SFCA are inflated. The total authorization figure for the rulemaking, however, has been adjusted and is accurate.

OTC DRUGS

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA), Washington, D.C.	First Application (11/3/76)	Testimony: functioning of FDA review panels and monographs. Serve as group representative at all of the hearings. Submit post-record comments.	$18,765.00	$ 7,545.00 (deferred decision on post-record comments; reduced hourly rate for attorneys)
	Second Application (1/21/77)	Witness fees for former members of FDA drug review panels.	1,705.00	1,411.00
	Third Application (2/17/77)	Additional attorney time because hearings are scheduled to run longer than anticipated.	10,280.00	6,604.00 (reduced hourly rate for attorneys)
	Fourth Application (4/8/77)	Submit rebuttal and post-record comments.	7,637.00	7,637.00
	Fifth Application (5/25/77)	Overrun: additional costs for expert witness.	534.68	498.90
	Sixth Application (8/7/77)	Overrun: expenses for expert consultants used on rebuttal.	775.00	775.00
			$39,696.68*	$24,470.90
California Citizen Action Group (CalCAG)	First Application (7/20/76)	Testimony: consumer survey concerning assumptions about the safety and efficacy of over-the-counter drugs, understanding of present system of regulation, attitude toward regulation expert witnesses on advertising. Coordination with other consumer groups and assistance in preparing testimony. Serve as group representative. Submit rebuttal.	$32,350.00	$26,620.00 (denied coordination with other consumer groups)
	Second Application (12/1/76)	Revision of evidence-gathering portion of initial proposal.	6,992.00	6,492.00

	Third Application (4/20/77)	Overrun: increased costs because the hearings ran longer than expected ($6,827.13). Additional rebuttal expenses. Submit post-record comments.	10,233.13	7,541.13 (verbally requested additional information on post-record comment and rebuttal expenses)
	Fourth Application (5/24/77)	Revision of rebuttal budget proposed in prior request.	3,030.00	3,030.00
			$52,605.13*	$43,683.13
Council on Children, Media and Merchandising (CCMM), Washington, D.C.	First Application (11/17/75)	Not clear; evidently expert testimony relating to effects of advertising on children.	$22,536	None
	Second Application (11/4/76)	Testimony: to represent children as well as adults who are deaf, blind, illiterate or possessing minimal schooling; will consult with behavioral scientists and pharmacologists. Participation at the hearing. Submit post-record comments.	43,966	None
	Third Application (12/23/76)	Testimony: Prepare questions for other witnesses.	27,560.	21,203
	Fourth Application (3/3/77)	Revision of authorized budget categories.		New Total: 20,311
	Fifth Application (5/3/77 and 5/19/77)	Revision of authorized budget categories. Submit rebuttal and post-record comments.	25,249	New Total: 25,249.
			$119,311*	$25,249
Total authorization for OTC drugs:				$93,403.03

CREDIT PRACTICES

Applicant	Date of Application	Proposed Activities	Request	Authorization
California Public Interest Research Group (CalPIRG)	First Application (7/20/77)	Serve as group representative at the Dallas and San Francisco hearings.	$24,435.00	None
	Second Application (7/26/77)	Testimony: study of consumer credit in California.	28,796.32	None
			$53,231.32	None
Council of State Credit Institutes, Georgia	7/21/77	Submit pre-hearing comments: compile statistical information from members. Testimony. Cross-examination at D.C. hearings. Post-hearing participation.	$ 6,802.00	$ 6,228.00 (plus the cost of hearing transcripts)
		Transcripts		2,741.05
		Transcripts		760.95
			$ 6,802.00	$ 9,730.00
Legal Aid and Defender Society of Greater Kansas City, Inc. (Richard F. Halliburton), Missouri	8/28/75	Testimony: representing the Society's clients (all poor persons in the Greater Kansas City area).	$ 222	None
National Consumer Law Center (NCLC), Massachusetts	First Application (2/26/76)	Testimony: consumers, consumer representatives and experts (relating to prevalence and impact of abuses and the failure of similar state regulation to lessen the availability of credit). Survey of legal aid lawyers.	$119,415.00	$ 91,020.00 (substantially reduced number of witnesses allowed; denied category of fringe benefits for personnel)
	Second Application (6/25/76)	Trips to review the record.	1,332.00	1,332.00

Third Application (7/2/76)	Increased time for statistician.	2,000.00	2,000.00
Fourth Application (9/17/76)	Additional time needed to complete the survey, as modified.	4,005.24	4,005.24
Fifth Application (9/16/77)	Additional expenses necessitated by fourth hearing. Submit rebuttal and post-record comments.	18,635.00	11,035.00 (denied rebuttal and post-record comments)
Sixth Application (3/8/78)	Submit rebuttal.	22,864.00	22,864.00
		$168,251.24*	$132,256.24
Total authorization for credit practices:			$141,986.24

HEALTH SPAS

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA), Washington, D.C.	First Application (4/13/77)	Testimony: test shopping survey of health spas in D.C. area; consumer witnesses; expert economic witness; former employees of health spas. Serve as group representative at all of the hearings. Submit rebuttal and post-record comments.	$42,362.00	$ 9,408.00 (approve survey only)
	Second Application (8/5/77)	Serve as group representative at all of the hearings with CalCAG/CU.	22,402.50	16,539.00 (reduced number of hours allowed for attorneys)
	Third Application (9/12/77)	Resubmission of application for compensation for the time of ADA Committee members.	450.00	450.00
	Fourth Application (9/29/77)	Additional witness	167.00	192.00
	Fifth Application (10/7/77)	Additional witnesses	735.00	853.00
	Sixth Application - joint application from ADA and CU/CalCAG (10/14/77)	Retain Public Interest Economics Foundation to assist in analysis of economic issues, including testimony and cross-examination.	5,192.00**	5,028.00**
	Seventh Application - joint application from ADA and CU/CalCAG (11/10/77)	Purchase two copies of transcript (or purchase one copy and then photocopy it, which would be less expensive).	4,772.60**	3,000.00**
	Eighth Application (12/27/77)	Participate in additional negotiations and hearings dealing with questions of access to data underlying industry surveys.	3,323.00	3,743.00

	Ninth Application - joint application from ADA and CU/CalCAG (1/23/78)	Additional transcript costs	109.00**	109.00**
	Tenth Application (3/6/78)	Submit rebuttal jointly with CalCAG/CU.	8,143.00	8,143.00
	Eleventh Application - joint application from ADA and CU/CalCAG (3/16/78)	Additional transcript costs	315.00**	315.00**
			$87,971.10*	$47,780.00
Association of Physical Fitness Centers (APFC), Washington, D.C.	5/31/77	Witness preparation and attorney representation at all hearings. Submit rebuttal and post-record comments.	$58,972.00	None
Consumers Association of Kentucky, Inc. (C.A.K.)	2/19/76	Testimony: application filed in Hearing Aids proceeding would also cover participation in the Health Spas rulemaking.	Not Stated	None
Consumers Union of United States, Inc. (West Coast) (CU) *and* California Citizen Action Group (CalCAG), California	First Application (12/29/76, 1/3/77, and 2/17/77)	Testimony: legal analysis of existing state law; longitudinal study of consumer complaints in California before and after enactment of regulatory legislation; analysis of health spa contracts; survey of consumer experience with health spas. Serve as group representative for West Coast hearings. Submit rebuttal.	$15,420.00	$ 8,850.00 (defer decision on rebuttal and group representative funds)
	Second Application (5/24/77)	Resubmission of proposal to review and analyze submissions in the record.	3,670.00	3,850.00
	Third Application (8/15/77)	Serve as group representative with ADA.	15,590.00	15,812.00

HEALTH SPAS—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Fourth Application - joint application from ADA and CU/ (10/14/77)	Retain Public Interest Economics Foundation to assist in analysis of economic issues, including testimony and cross-examination	5,192.00**	5,028.00**
	Fifth Application - joint application from ADA and CU/ CalCAG (11/10/77)	Purchase two copies of transcript (or purchase one copy and then photocopy it, which would be less expensive).	4,772.60**	3,000.00**
	Sixth Application - joint application from ADA and CU/ Cal/CAG (1/23/78)	Additional transcript costs	109.00**	109.00**
	Seventh Application (3/6/78)	Submit rebuttal jointly with ADA.	7,354.00	7,354.00
	Eighth Application	Serve as group representative with ADA at additional hearings to be held in New York.	2,245.00	2,245.00
	Ninth Application - joint application from ADA and CU/ CalCAG (3/16/78)	Additional transcript costs	315.00**	315.00**
	FTC Notice (4/26/78)	The FTC revised the hourly rates for attorneys.	N/A	1,428.00
			$54,667.60*	$47,991.00
Total authorization for health spas:				$87,319.00

** These were joint requests and joint authorizations for ADA and CU/CalCAG. Each request figure and each authorization figure appears twice in this chart. In fact, however, these amounts were requested and authorized only once. For this reason, the request and authorization totals for ADA and CU/CalCAG are inflated. The total authorization figure for the rulemaking, however, has been adjusted and is accurate.

MOBILE HOMES

Applicant	Date of Application	Proposed Activities	Request	Authorization
Center for Auto Safety (CFAS), Washington, D.C.	First Application (10/24/75)	Testimony: consumers and experts. Serve as group representative.	$27,749 (plus $480 per day during the hearings for CFAS attorneys)	$ 9,133 (denies economic study, postpones computation of hearing time for CFAS attorneys until hearing dates set)
	Second Application (4/22/76)	Testimony: economic analysis. Serve as group representative. Submit rebuttal and post-record comments.	10,460	9,915
	Third Application (6/8/76)	Participation of CFAS attorneys at hearings.	7,134	7,134
	Fourth Application (10/19/77)	Analysis of existing complaints; survey of new mobile home owners; further economic analysis. Additional costs for participation in expanded hearings.	16,654	14,819 (denied survey of new owners)
	Fifth Application (1/9/78)	Submit rebuttal.	7,656	7,656
			$69,653*	$48,657
Department of the Attorney General, Consumer Protection Division, Massachusetts	8/5/77	Travel and per diem expenses for three attorneys to participate in D.C. hearings.	$ 547	None
Golden State Mobilhome Owners League, Inc. (GSMOL), California	First Application (10/20/76, 1/4/77 and an undated revised budget that was received on 6/2/77)	Testimony: survey of mobile home owners to determine experience with warranty performance. Serve as group representative.	$28,555.00	$28,280.00

Mobile Homes—Continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Second Application (6/7/77)	Travel to Washington to observe hearings.	1,843.00	500.00 (to purchase transcripts of D.C. hearings)
	Third Application (5/25/78)	Overrun: additional survey expenses.	1,028.52	None
			$31,426.52	$28,780.00
The Housing Advocates, Ohio	First Application (5/25/77 and 7/1/77)	Testimony: statewide survey of Ohio mobile home owners; attorney to assist in preparation of testimony. Serve as group representative at San Francisco hearings.	$43,794.50	$36,723.60 (denied personal interview followup to mail survey; limited role at hearings)
	Second Application (8/16/77)	Travel and per diem expenses to attend pre-hearing conference in D.C.	238.00	No Record Found
	Third Application (8/16/77)	Additional expenses in development and implementation of survey of mobile home owners. Participation as alternate group representative at California hearings. Post-hearing preparation of proposed findings and conclusions. Submit post-record comments.	11,384.86	6,595.60 (deferred decision on post-hearing participation)
	Fourth Application (12/29/77)	Additional expenses in prehearing preparation; hearing transcripts.	2,729.26	No Record Found
	Fifth Application (2/18/78)	Submit rebuttal: includes follow-up with persons who didn't respond on the survey.	9,313.05	9,313.05
	Sixth Application (3/10/78)	Keypunch and computer time for late respondents.	405.00	405.00

	Seventh Application (5/6/78)	Data processing and telephone costs in preparation for hearing; salary and travel expenses for research coordinator and project consultant to participate at hearings.	1,715.60	1,715.60
			$69,580.27	$54,752.85
Manufactured Housing Institute (MHI), Virginia	11/30/77	Testimony: study of the economic impact of the proposed rule on the mobile home industry and alternative forms of regulation.	$40,000.00	None
Michigan Mobile Homeowners Association	6/22/77	Testimony: survey of mobile home purchasers to determine form and content of warranties, experiences with requests for service under warranty, and physical characteristics of mobile homes.	$57,986.00	$ 2,224.00 (because of insufficient time, participation is limited to analysis of and testimony on consumer complaints they already have)
National Manufactured Housing Federation (NMHF), Washington, D.C.	First Application (11/28/77)	Testimony: presenting the dealer interest and point of view. Serve as group representative at San Francisco hearings.	$10,987.00	$ 8,627.00 (no separate authorization for overhead — included in hourly rates)
	Second Application (1/31/78)	Overrun: additional expenses because the hearings were extended ($1,662.96). Purchase hearing transcript.	2,662.96	2,662.96
	Third Application (2/1/78)	Submit rebuttal.	8,855.00	8,855.00
	Fourth Application (5/11/78)	Overrun: additional costs for rebuttal.	873.41	No Record Found
			$23,378.37	$ 20,144.96
Total authorization for mobile homes:				$154,558.81

THERMAL INSULATION (R-VALUE)

Applicant	Date of Application	Proposed Activities	Request	Authorization
Arizona Consumers Council	12/9/77	Testimony: surveys of consumers (regarding their understanding of and their desire for further disclosures) and sellers (cost perceptions of various regulatory alternatives).	$11,060	$ 1,036 (testimony only - no time to do survey)
California Public Interest Research Group, Inc. (CalPIRG) *and* California Citizen Action Group (CalCAG)	1/6/78	Testimony: test shopping of insulation sellers to determine what disclosures are made; consumer "focus groups" to explore understanding of meanings of R-Value.	$27,521	None
Center for Public Representation (CPR), Wisconsin	12/23/77	Testimony: documentation of the need for the rule (surveys) suggested refinements of the rule.	$ 4,573.09	$ 4,573.09
Coalition (Sierra Club - California; Friends of the Earth - California; Natural Resources Defense Council - New York; Environmental Defense Fund - New York)	First Application (1/16/78, 1/18/78 and 1/19/78)	Testimony: expert witnesses on measurement techniques for testing thermal resistance; general policy positions; environmental impact. Representation at hearings.	$17,495	$17,645
	Second Application (2/3/78)	Additional attorney costs because the hearings will run longer than expected.	2,080	2,080
	Third Application (3/2/78)	Purchase transcript.	1,260	1,260
	Fourth Application (3/21/78)	Submit rebuttal.	4,030 (in addition to reprogramming $3500 in previously granted	3,950 (plus approval of funds transfer)

			funds for rebuttal)	
	Fifth Application (8/11/78)	Submit post-record comments.	8,860	3,000 (reduced number of hours allowed)
	Sixth Application (11/9/78)	Oral presentation to the Commission.	2,256	2,306
			$35,981	$30,241
Consumer Federation of America (CFA), Washington, D.C.	12/23/77, 1/18/78, and 1/20/78	Submit pre-hearing comments. Representation at hearings. Testimony: expert witnesses on economic and other technical issues; mobilize other consumer groups to gather evidence.	$19,465.00 (amended to a lower figure orally - exact amount not known)	$ 2,141.10 (testimony only)
Insulation Contractors Association (ICA), California	2/3/78	Testimony: two witnesses (nature of testimony not specified).	$ 1,000	No Record Found
National Association of Home Insulation Contractors (NAHIC), Washington, D.C.	First Application (1/10/78, and 1/16/78 and 1/26/78)	Representation at hearings. Testimony: three contractors.	$ 5,800.00	$ 5,560.00
	Second Application (2/23/78)	Additional attorney costs because hearings will run longer than expected. Submit rebuttal.	6,210.00	6,210.00
	Third Application (3/10/78)	Submit post-record comments. Purchase transcript.	2,420.00	3,000.00
	Fourth Application (4/28/78)	Request reimbursement for costs of duplication and transportation that have already been incurred.	242.98	242.98
	Fifth Application (6/20/78)	Overrun: additional attorney costs.	38.21	38.21

THERMAL INSULATION (R-VALUE)—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Sixth Application (11/30/78)	Overrun: additional attorney costs.	836.87	836.87
			$15,548.06	$15,888.06
National Consumers League (NCL), Washington, D.C.	First Application (12/29/77)	Testimony: technical expert (technical aspects of home insulation) and non-technical (labeling and advertising requirements). Representation at hearings. Submit rebuttal.	$24,912	$18,512 (deferred decision on rebuttal)
	Second Application (2/2/78)	Additional costs for participation of representative in extended hearings.	8,112	8,112
	Third Application (3/9/78)	Submit rebuttal. Purchase transcript.	8,160	8,160
	Fourth Application (7/27/78)	Submit post-record comments.	16,780	7,700 (reduced number of hours allowed)
			$57,964*	$42,484
Total authorization for thermal insulation:				$96,363.25

OTC Antacids

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA) *and* National Council of Senior Citizens, Inc. (NCSC), Washington, D.C.	First Application (Undated; received 7/14/77)	Submit pre-hearing comments.	$ 5,563	$ 4,115 (request additional explanation for the expenses of ADA members)
	Second Application (11/18/77)	Researcher. Resubmission of request for reimbursement for application member for time spent preparing for and attending meetings to formulate applicant's position.	2,722	2,722
	Third Application (5/8/78)	Attendance at special conference on television advertising and medicine.	245	245
	Fourth Application (11/16/78)	Testimony: expert witnesses. Serve as group representative.	14,510	14,510
			$23,040*	$21,592
California Citizen Action Group (CalCAG)	8/24/77	Testimony: research studies concerning development of criteria to determine when a cautionary statement is required in mass media advertising, effects of different formats that might be used in disclosing cautionary statements, and current in-store label inspection by consumers. Serve as group representative.	$64,228	$64,228
Council on Children, Media and Merchandising (CCMM), Washington, D.C.	First Application (Undated; received 9/21/77)	Testimony: research to examine vulnerability of children and deaf, blind, or functionally illiterate adults to radio and television advertising of antacid products.	$26,644.00	$26,644.00

OTC DRUGS—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Second Application (3/10/78)	Survey of 160 functionally illiterate persons (migrant camps, Appalachia and urban poor).	11,256.74	None
	Third Application (6/9/78)	Additional personnel time to prepare for hearing. Revision of prior application (survey in migrant camps).	19,325.74	11,356.74 (most additional personnel time not approved)
	Fourth Application (8/3/78)	Overruns	No Record Found	No Record Found
	Fifth Application (12/5/78)	Serve as group representative in conjunction with ADA and CalCAG. Review testimony. Prepare witness to testify on survey.	3,063.89	3,063.89
	Sixth Application (12/22/78)	Round-trip air fare to attend D.C. hearings, should the schedule necessitate such a trip.	460.00	No Record Found
			$60,750.37*	$41,064.63
Virgina Citizens Consumer Council (VCCC)	3/5/78	Survey of consumer interests in regard to antacid products.	$46,597	None
Total authorization for OTC Antacids:				$126,884.63

CHILDREN'S ADVERTISING

Applicant	Date of Application	Proposed Activities	Request	Authorization
Action for Children's Television (ACT), Massachusetts, *and* Center for Science in the Public Interest (CSPI), Washington, D.C.	First Application (5/16/78)	Testimony: three research studies; expert testimony (dentists, pediatricians, nutritionists, and child psychiatrists). Submit pre-hearing comments. Outreach project to generate comments from the public. Participation of attorney and staff member at hearing. Proposal of disputed issues.	$97,901.00	$13,497.50 (deferred everything outside of the comment period; approval of remaining budget for comments and studies deferred pending submission of detailed breakdown of attorney expenses and Galst study budget)
	Second Application (6/28/78)	Survey to catalog information on existing public service announcements designed for children.	4,449.20	None
	Third Application (7/5/78 and 8/1/78)	Resubmission of request concerning Galst study of television commercials as a determinant of preschool children's snack preferences.	11,920.00	11,920.00
	Fourth Application (7/17/78)	Resubmission of request concerning attorney expenses during the comment period.	36,129.00	35,725.00
	Fifth Application (8/22/78)	Request that FTC deobligate funds previously authorized for reimbursement of CSPI staff member's expenses.	−7,598.00	−7,598.00
	Sixth Application (10/25/78 and 10/31/78)	Analysis of statements by witnesses and written comments. Testimony. Participation at hearing. Proposal of disputed issues.	39,424.50	23,471.70 (only one attorney authorized to monitor hearing;

CHILDREN'S ADVERTISING—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
				deferred decision on disputed issues);
			$182,225.70*	$77,016.20
Center for Public Representation (CPR), Wisconsin	First Application (4/26/78)	Testimony: studies of the effect of television advertising on 350 children.	$17,770	$16,350 (deferred decision on travel expenses)
	Second Application (6/26/78)	Expand the number of children interviewed for the research project.	2,674	2,674
			$20,374	$19,204
Community Nutrition Institute (CNI), Washington, D.C.	First Application (8/3/78)	Testimony: studies to determine shopping practices and knowledge of nutrition information of low-parents.	$32,768	$32,768
	Second Application (12/12/78)	Review material on the record in preparation for the legislative hearings; monitor legislative hearings; proposal of disputed issues.	20,383	7,898 (deferred decision on proposal of disputed issues)
	Third Application (12/23/78)	Additional time for review of the record.	6,162	Pending
			$59,313	$40,666
Consumers Union of the United States, Inc. (CU) *and* Committee on Children's Television (CCT), California	First Application (5/16/78)	Testimony and written comments: studies on what is unfair and deceptive to children, industry self-regulation, remedies, age cut-off point for children, the First Amendment, and corporate liability. Analysis of comments and preparation of questions for Presiding Officer at San Francisco	$149,244	$19,700 (preparation for San Francisco hearing deferred; a more detailed explanation of many

		hearing.		of the projects is needed)
	Second Application (7/3/78 and 7/11/78)	Detailed explanation of some of the projects.	22,238	22,238
	Third Application (7/28/78)	Detailed explanation of some of the projects.	51,024	None (Information will be available from others; some projects not significantly material)
	Fourth Application (11/7/78)	Analysis of comments and preparation of questions for Presiding Officer at San Francisco and D.C. hearings. Witness preparation.	16,348	16,348
	Fifth Application (Undated; received on 11/21/78)	Expenses for nine witnesses. Participation at San Francisco and D.C. hearings (three persons).	26,838	15,630 (only one attorney approved for attendance at hearings)
			$265,692*	$73,916
Council on Children, Media and Merchandising (CCMM), Washington, D.C.	First Application (4/27/78)	Testimony: research to determine children's present knowledge of dental health and good nutrition, the extent to which children can be taught to evaluate advertising, the role of parents in teaching children about advertising, and children's actual eating patterns; study effects of advertising on children.	$182,759.00	$26,664.00 (methodology and personnel for research projects must be presented in more detail; some projects not significantly pertinent)
	Second Application (7/7/78)	Request to withdraw prior application and authorization. Research to explore the combination of "child protective efforts" that can awaken parents and children to the role of commercials in television today.	35,230.00	New Total: 35,230.00

CHILDREN'S ADVERTISING—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Third Application (10/20/78)	Review written comments and prepare questions for hearings.	15,498.00	15,498.00
	Fourth Application (10/30/78 and 11/18/78)	Revision of authorized budget.	35,218.00	Revision of 35,230 Total: 35,218.00
	Fifth Application (12/5/78)	Expenses incurred in negotiations for withdrawn applications	2,657.95	None
	Sixth Application (12/11/78)	Overruns in expenses for principal interviewer and evaluator.	1,658.76	No Record Found
	Seventh Application (12/22/78)	Request for three persons to attend the San Francisco and D.C. hearings.	11,175.00	7,67.00 (approval for one person)
	Eighth Application (1/3/79)	Additional preparation for hearings.	3,360.00	Pending
			$287,556.71*	$58,392.00
Media Access Project (MAP) Washington, D.C.	First Application (6/15/78)	Study to determine the effectiveness of nutritional information in advertisements directed to children; will submit a report containing findings and legal analysis.	$35,163	$35,163
	Second Application (7/27/78)	Consultant to assist in study (as requested by FTC).	1,650	1,650
	Third Application (8/3/78)	Request that FTC deobligate part of prior authorization because of reduced cost of administering test instrument.	– 3,000	– 3,000
			$33,813	$33,813

Public Interest Economics Foundation (PIE-F) Washington, D.C.	Undated; received 6/28/78	Preparation of three statements suitable for use as expert testimony (concerning the role of advertising in a market economy, the financial impact of proposed rule on industry and children's programming, and the relationship between children's television advertising and consumption patterns).	$17,659.19	None
Safe Food Institute (SFI), California	7/18/78	Testimony: dental surveys (California and national) and interviews with California health professionals.	$37,527	$12,265 (only approved the interviews with California health professionals)
Daniel B. Wackman Professor, University of of Minnesota	1/19/79	Travel expenses to appear at D.C. hearing to testify about his independent research on the effects of television advertising on children (with colleagues Scott Ward and Ellen Wartella).	$ 316	Pending
Ellen Wartella Assistant Professor, The Ohio State University	1/26/79	Travel and per diem funds to cover expenses of traveling to D.C. to testify about her independent research on the effects of television advertising on children (with colleagues Scott Ward and David Wackman).	$ 143	Pending
Total authorization for children's advertising:				$315,092.20

APPENDIX B

COMPARISION OF COMPENSATION PROVISIONS OF SELECTED REGULATORY REFORM BILLS INTRODUCED IN THE NINETY-SIXTH CONGRESS

The Administration Bill — S.755, 96th Cong., 1st Sess. (1979), Section 302 (adding a new section 591 to Title 5, U.S. Code)

The Ribicoff Bill — S.262, 96th Cong. 1st Sess. (1979), Section 403 (adding a new section 593 to Title 5, U.S. Code)

The Kennedy Bill — S.1291, 96th Cong., 1st Sess. (1979), Section 104 (adding a new section 558a to Title 5, U.S. Code)

The Dellums Bill — H.R.254, 96th Cong., 1st Sess. (1979), Section 201 (adding a new section 560 to Title 5, U.S. Code)

* * * * *

I. Agency Administering Compensation Program

A. *Administration Bill.*—Each agency administers own program, ACUS reports to the President from time to time on agencies "which have failed to make an effective use of the authority" to compensate.

B. *Ribicoff Bill.*—ACUS provides financial assistance.

C. *Kennedy Bill.*—ACUS provides financial assistance after consultation with affected agency.

D. *Dellums Bill.*—Each agency administers own program.

II. Types of Agency Proceeding Included in Compensation Program

A. *Administration Bill.*—Any agency proceeding in which there may be public participation "pursuant to statute, agency rule, or agency practice."

B. *Ribicoff Bill.*—Any agency proceeding or analysis involving a regulatory function when participation by the applicant "is otherwise authorized by statues, regulation, agency practice, or the exercise of agency discretion."

C. *Kennedy Bill.*—Same as Ribicoff Bill.

D. *Dellums Bill.*—Agency proceedings governed by 5 U.S.C. §§553-557 (rulemaking and adjudication under the Administrative Procedure Act).

III. Types of Costs Which are Reimbursable

A. *Administration Bill.*—Costs of participation, including the costs of attorneys and other experts. Advance payments explicitly authorized.

B. *Ribicoff Bill.*—Costs of participation, including the costs of attorneys, transcripts and experts. Advance payments explicitly authorized.

C. *Kennedy Bill.*—Same as Administration Bill.

D. *Dellums Bill.*—Reasonable attorney fees and other reasonable costs, including fees for witnesses and the costs of filing and reproducing materials. No mention of advance payments.

IV. Applicant's Interest in the Proceeding

A. *Administration Bill.*—Person represents an interest which, if represented in the proceeding, could reasonably be expected to contribute substantially to a fair disposition of the proceeding, taking into account whether the interest is adequately represented by another person in the proceeding, the need for representation of a fair balance of interests, and the complexity and importance of the issues involved.

B. *Ribicoff Bill.*—Person represents an interest "the representation of which could reasonably be expected to contribute substantially to a fair disposition of the proceeding, taking into account the need for representation of a fair balance of interests, and the complexity and relative importance of the issue involved."

C. *Kennedy Bill.*—person represents an interest "the representation of which could reasonably be expected to contribute substantially to a fair disposition of the proceeding, taking into account

(A) the need for representation of a fair balance of interests,

(B) the complexity and relative importance of the issue involved,

(C) whether the person represents a substantial public interest, and

(D) the importance of public participation after considering the need to encourage participation by segments of the public who may have little economic incentive to participate."

D. *Dellums Bill.*—No interest test.

V. Applicant's Competence or Ability to Contribute to the Decision

A. *Administration Bill.*—Applicant must be "an effective representative" of the interest in question.

B. *Ribicoff Bill.*—Same as Administration Bill.

C. *Kennedy Bill.*—Same as Administration Bill.

D. *Dellums Bill.*—Applicant must have "made a substantial contribution toward agency implementation of the intent of any law pursuant to which such proceeding is conducted."

VI. Applicant's Financial Condition or Economic Stake

A. *Administration Bill.*—The "economic interest of the person, or of the majority of the members of such person as individuals, in the disposition of the proceeding is small in comparison to the costs of effective participation in the proceeding, or the person does not have sufficient resources available to participate effectively in the proceeding in the absence of financial assistance."

B. *Ribicoff Bill.*—Same in substance as Administration Bill.

C. *Kennedy Bill.*—Same as Administration Bill.

D. *Dellums Bill.*—Applicant is "unable to bear the burden of such fees and costs" of participating.

VII. Procedural Requirements

A. *Administration Bill.*—Each agency must publish procedural rules for comment within 90 days of enactment of statute, and publish final rules within 180 days. Compensation decision cannot be made "by any office, bureau, or other division of an agency having responsibility for the presentation of the case or the initial decision or recommendation [in the proceeding where funding is sought] . . . except that agency personnel involved in such proceeding may provide information relevant to such determinations." ACUS must review agency rules and procedures to assure compliance, and report to the President.

B. *Ribicoff Bill.*—ACUS is directed to issue rules governing implementation of the compensation program (§595(a)).

C. *Kennedy Bill.*—ACUS is directed to consult with agencies in making compensation decisions. The Conference must propose regulations within 90 days of enactment of the statute, "to guarantee that the funds are distributed fairly and expeditiously to the participants in agency proceedings." The regulations must contain provisions for (1) annual estimations by agencies of their needs for public participation funds, (2) procedures for submitting applications, (3) rules to avoid duplicative presentations, (4) procedures for evaluating the performance of compensated participants and recovering overpayments, as well as auditing recipients. The regulations must be adopted within 270 days of enactment of the statute. ACUS and the individual agencies must report annually to OMB on the disbursement of compensation funds.

D. *Dellums Bill.*—Agencies are directed to prescribe rules governing compensation. No directives as to timing or content of rules.

VIII. Judicial Review of Compensation Decisions

A. *Administration Bill.*—Judicial review of compensation decisions is precluded by statute.

B. *Ribicoff Bill.*—No provision.

C. *Kennedy Bill.*—No provision.

D. *Dellums Bill.*—No provision.

IX. Authorization of Appropriations for Compensation Awards

A. *Administration Bill.*—$20 million per year thorugh FY ending September 30, 1982.

B. *Ribicoff Bill.*—A general authorization of appropriation for ACUS activities is included, but the amount is left blank (*see* §403(d)).

C. *Kennedy Bill.*—Same as Administration Bill.

D. *Dellums Bill.*—No provision.

APPENDIX C

SUMMARY TABULATION OF CORRESPONDENCE BETWEEN PRESIDING OFFICER AND STAFF RECOMMENDATIONS AND ACTION ON COMPENSATION REQUESTS*

(Considers only initial applications; partial and full grants or grant recommendations are treated as a grant, and only total denial is treated as denial)

In 42 cases, staff recommendations, Presiding Officer recommendations, and action letters were present in the file:

Staff, Presiding Officer, and FTC Decision Agrees	28
Staff and Presiding Officer Agree, Decision Differs	9
Staff and Presiding Officer Disagree, FTC Decision Follows Staff Recommendation	2
Staff and Presiding Officer Disagree, FTC Decision Follows Presiding Officer Recommendation	3

In 34 cases, Presiding Officer recommendations and FTC action letters were present in the file, but staff recommendations were missing:

Presiding Officer and Decision Agree	29
Presiding Officer and Decision Differ	5

In one case, the Presiding Officer's recommendation was missing from the file; in that instance, the staff recommendation and the FTC decision agreed.

In seven cases, files were too fragmentary to permit determination of agreement between recommendation and action.

* * * * *

Overall, staff recommendations were present in 43 of 84 cases; the FTC decision agreed with the staff recommendation in 31 of these cases (72%).

Presiding Officer recommendations were present in 76 of 84 cases; the FTC decision agreed with the Presiding Officer's recommendation in 60 of these cases (79%).

Note: in seven cases where the FTC followed a staff or Presiding Officer recommendation, the rationale stated in the action letter was significantly different from the rationale of the recommendation followed.

Staff and Presiding Officers concurred in 37 out of the 42 cases where both recommendations were present (88%).

When both staff and Presiding Officer concurred, the FTC decision agreed with their recommendation in 28 out of 37 decisions (75%).

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* This chart does not include any recommendations or actions after February 1978.

REPORT IN SUPPORT OF RECOMMENDATION 79-6

JUDICIAL REVIEW AND THE BUMPERS AMENDMENT*

*Ronald M. Levin***

I. INTRODUCTION

It is reported that Congressional staff members handling S. 1477, the proposed Federal Courts Improvement Act, were "shocked"[1] when Senator Dale L. Bumpers of Arkansas recently succeeded in persuading the Senate to attach to the bill a far-reaching amendment to the Administrative Procedure Act (APA). The Bumpers Amendment would replace the first sentence of the scope-of-review section of the APA (5 U.S.C. Sec. 706) with the following language:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of the agency action. There shall be no presumption that any rule or regulation of any agency is valid, and whenever the validity of any such rule or regulation is drawn in question in any court of the United States or of any State, the court shall not uphold the validity of such challenged rule or regulation unless such validity is established by a preponderance of the evidence shown. *Provided, however,* That if any rule or regulation is set up as a defense to any criminal prosecution or action for civil penalty, such rule or regulation shall be presumed valid until the party initiating the criminal prosecution or action for civil penalty shall have sustained the burden of proof normally applicable in such actions.[2]

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* This study, published in Current Issues and Regulatory Reform, Rosenberg, M.L. and McGovern, B.B., Federal Bar Assn., 1980, p. 264, builds upon a report prepared by this writer, in collaboration with David R. Woodward, for the use of the Administrative Law Section of the American Bar Association. That report, which analyzed the Bumpers Amendment in the form in which it was originally proposed, has been published as Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action,* 31 Ad. L. Rev. 329 (1979).

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[1] Legal Times of Washington, September 10, 1979, at 1.

[2] 125 Cong. Rec. S12145 (daily ed. Sept. 7, 1979). The last "or" in the proviso clause does not appear in the Congressional Record, due to a typographical error, but does appear in the version passed by the Senate.

The first sentence of the proposed statute duplicates the current opening sentence of Section 706, except that the third-to-last word has been changed from "an" to "the." One would assume that this change results from inadvertence, and nothing in the legislative history suggests otherwise.

The sudden prominence of the Bumpers Amendment has generated widespread speculation and apprehension about the manner in which it would transform administrative law if enacted. The purposes of this report are to offer hypotheses concerning the meaning of the Amendment, to evaluate the Amendment's impact on current scope-of-review principles, and to suggest some of the practical consequences that the Amendment seems likely to engender if it becomes law. The intellectual challenge associated with these tasks should be apparent: Senator Bumpers' proposal forces us to confront anew a number of fundamental administrative law issues that seemingly had been resolved long ago.

II. LEGISLATIVE HISTORY OF THE AMENDMENT TO DATE

The Bumpers Amendment was first introduced in 1975 as S. 2408.[3] In its original form it would have replaced the current first sentence of Section 706 with the following language:

> To the extent necessary to decision and when presented, the reviewing court shall de novo decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. There shall be no presumption that any rule or regulation of any agency is valid, and whenever the validity of any such rule or regulation is drawn in question in any court of the United States or of any State, the court shall not uphold the validity of such challenged rule or regulation unless such validity is clearly and convincingly shown: *Provided, however,* that if any rule or regulation is set up as a defense to any criminal prosecution or action for civil penalty, such rule or regulation shall be presumed valid until the party initiating the criminal prosecution or action for civil penalty shall have sustained the burden of proof normally applicable in such actions.

It will be noticed that S. 2408 differed from the Amendment approved by the Senate in two particulars. First, it would have inserted the words "de novo" into the present first sentence, so that courts would be instructed to "de novo decide all relevant questions of law." Second, it would have forbidden courts to uphold a rule or regulation unless its validity was "clearly and convincingly shown," in contrast to the present Amendment's requirement that the validity of the rule be "established by a preponderance of the evidence shown."

Senator Bumpers delivered a speech to the Senate supporting S. 2408[4] and also testified before the Senate Administrative Practice and Procedure

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[3] S. 2408, 94th Cong., 1st Sess. (1975).

[4] 121 Cong. Rec. 29956 (1975).

Subcommittee on its behalf.[5] He introduced the same bill in 1977[6] and again in January 1979.[7] For purposes of analysis it is relevant to observe that the speeches he gave on these occasions were in essence slightly rewritten versions of a single address.

That was the totality of the legislative history of the Amendment until the proposed Federal Courts Improvement Act came before the Senate on September 7, 1979. Senator Bumpers offered his proposal, with the revisions mentioned above, as an unpublished amendment,[8] apparently having given his colleagues and the agencies no more than twenty-four hours' advance notice of his intention.[9] His remarks in support of the Amendment again incorporated substantial passages from his prior floor speeches. During the debate,[10] Senators Domenici, Morgan, Chiles, and Exon also spoke in favor of the bill, while Senators Kennedy, Ribicoff, Dole, Muskie, Culver, and Schmitt spoke against it. A motion to table the Amendment failed by a vote of 27 to 51,[11] whereupon the opponents of the Amendment acquiesced and allowed it to be approved by voice vote.[12]

III. DIFFICULTIES OF INTERPRETATION

It seems desirable to commence our analysis of the Bumpers Amendment by identifying precisely what changes in review standards the Senate intended to make. That task, however, is not an easy one. The text of the Amendment immediately raises questions such as these: What "presumption" does the bill purport to abolish? What kind of challenge to a regulation constitutes an attack on its "validity" within the meaning of the Amendment? What showing would satisfy the "preponderance of the evidence" standard the Amendment prescribes? The legislative history, if anything, aggravates the interpretive difficulties. Various statements made in support of the bill appear to reflect only a sketchy comprehension of the administrative law issues that normally arise during judicial review of agency action. Indeed, some of these remarks in the legislative history seem drastically at odds with the text of the statute itself. Such discrepancies, which might be expected in a long, technical piece of legislation, are rather disquieting when encountered in a bill that is only a paragraph long.

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[5] *Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary* 150 (1976). *See also* 122 Cong. Rec. 22012 (1976), where Senator Bumpers made a short speech about S. 2408 and introduced a statement by the Direct Selling Association supporting it.

[6] S. 86, 95th Cong., 1st Sess., 123 Cong. Rec. S286 (daily ed. Jan. 10, 1977).

[7] S. 111, 96th Cong., 1st Sess., 125 Cong. Rec. S411 (daily ed. Jan 23, 1979).

[8] 125 Cong. Rec. S12145 (daily ed. Sept. 7, 1979).

[9] *See id.* at S12155 (Sen. Muskie).

[10] *Id.* at S12146-65.

[11] *Id.* at S12166.

[12] *Id.* at S12171.

A. Does the Amendment Deal Only With Questions of Law?

A close reading of the floor debates yields the surprising conclusion that most, if not all, of the proponents of the Bumpers Amendment interpreted the Amendment in a manner quite at variance with what the plain words of the statute appear to say. The text of the proposed statute seems to tell the courts that they should grant no deference to the agencies when reviewing a rule—"There shall be no presumption that any rule or regulation of any agency is valid . . . . " The proponents, however, seem to have believed that courts would abandon their existing deference on only one issue—whether the rule was consistent with the agency's statutory authority. Yet they never explained how the words of the Amendment would support that construction. It is almost as though the qualifying phrase "on questions of law" had been inserted into the bill in some fashion that rendered the phrase invisible to all but the bill's supporters.

Senator Bumpers, for example, told the Senate that under the bill "(c)ourts could still defer to administrative expertise, if there is such a thing, when deciding issues of fact . . . . As to questions of law, however, the supremacy of the courts would be restored."[13] He commented that "(o)nly if a court were persuaded by a preponderance of evidence that a given rule or regulation was within the power delegated by Congress, would the rule or regulation be upheld," and that regulation writers will be more cautious if they "know that they must assume the burden of proving that a regulation is within its scope of authority, that is, within the intent of Congress."[14] He also said that courts "may not presume anything under this amendment, or, so far as review of the law is concerned, they will not presume anything."[15]

Other proponents spoke of the bill in similarly limited terms. Senator Domenici understood the Amendment to mean that "when in litigation the agency would bear the burden of proving that its regulations are within the congressional mandate rather than the individual proving they are not."[16] He favored this approach because "it is the duty of the courts to decide whether or not the executive branch has exceeded the authority delegated by the legislative branch."[17] Senator Morgan repeatedly framed the issue as one of assigning the burden of proving whether the agency was acting within "its statutory competence" or "the statutory authorization" or "the mandate given by the people's representatives."[18] He asserted that under the Amendment "the courts would reclaim their responsibility under our system of Government—interpreting the law."[19] Senator Exon declared: "The Bumpers Amendment is simple. It takes away the now court-recognized principle that a Federal agency's interpretation of Federal law is presumed to be correct."[20]

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[13] *Id.* at S12146.

[14] *Id.*

[15] *Id.* at S12150.

[16] *Id.*

[17] *Id.*

[18] *Id.* at S12153.

To be sure, the gloss which floor remarks like those just quoted seem to place on the Amendment can be discerned only with liberal use of negative inferences. Moreover, these comments must be viewed in the context of an overall debate in which the proponents often referred to the Amendment in general terms, giving no indication as to whether or not the proposal dealt solely with questions of statutory authority. Further, the above-quoted remarks must be compared with a few instances in which proponents seem to have indicated that they expected the burden to shift on questions *other* than issues of statutory authority—such as when Senator Bumpers stated that the Amendment would cause the courts to look at "the record" more carefully.[21] Nevertheless, the many references to statutory authorization as the basic question that courts would examine with greater intensity under the Amendment are too striking to ignore. And if the Amendment moves forward in Congress, one may see even more explicit legislative history along these lines. Indeed, an assistant to Senator Bumpers recently confirmed in an interview with this writer that the Amendment is only intended to charge agencies with the burden of proving that their regulations are consistent with the statutes they purport to implement; it does not, she stated, alter existing law governing challenges to rules on factual, policy, or procedural grounds.[22]

The peculiar discrepancy between text and legislative debates is not a mystery to one who is familiar with the complete history of the Amendment. It will be recalled that the original version of the Amendment, S. 2408, would have revised the courts' mandate in Section 706 to "decide all relevant questions of law" by inserting the phrase "de novo" just before those words. Senator Bumpers' speeches leave no doubt that the "de novo" language was intended as the vehicle by which judicial deference on legal questions would be eliminated. Thus, as recently as last January, he explained that "the meaning of the phrase 'de novo' is plain and obvious. It means that the courts will decide issues of law anew, without deference to previous agency determinations."[23] But a funny thing happened between

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[19] *Id.*

[20] *Id.* at S12165.

[21] *Id.* at S12154, S12165. *See also* Senator Domenici's curiously equivocal prescription: "Make it more difficult for (agencies) to be arbitrary or, put it the other way, they better be more careful in construing congressional intent . . . " *Id.* at S12151.

[22] Telephone interview with Rebecca Newman of Senator Bumpers' staff, October 4, 1979.

[23] 125 Cong. Rec. at S413.

January and September. Senator Bumpers apparently forgot why the words "de novo" had been placed in the bill. When he introduced the proposal as an amendment to S. 1477, he removed the "de novo" phrase—but solely, he explained, to remove any implication that the bill would require courts reviewing a rule to conduct evidentiary hearings of their own.[24] He thus continued to discuss the bill in terms of its special effects on review of questions of law, even though there was nothing left in the bill that would suggest such an interpretation to the average reader. The other Senators who spoke in favor of the bill apparently accepted Senator Bumpers' representations about its import without analyzing its language for themselves.

If and when the courts are asked to construe the Bumpers Amendment, they may decide that it cannot properly be confined to review of questions of law. With the deletion of the "de novo" clause, the only language on which such a distinction could readily be founded is gone. The ordinary meaning of the Amendment's words seems to require elimination of any presumption in favor of agencies when a rule is being challenged.

On the other hand, the courts may decide to give effect to the Senators' apparent purposes. Even though the "de novo" language is gone, the words of the Amendment can—with effort—be made to support such a narrow construction.[25] The argument would be that the terms "valid" and "validity" in the Amendment do not implicate all of the many grounds on which a rule may, under current standards, be upheld or struck down (*e.g.*, whether the agency used correct procedure, whether the rule rests on rational policy judgments and sufficient factual findings, whether the rule departs unjustifiably from past agency precedents, etc.). Instead, the argument would run, an agency trying to establish that its regulation is "valid" would merely have to show that it is not inconsistent with the underlying statute.[26] Under this construction, since the "presumption of validity" would be rescinded, courts would appraise the rule without deferring to the agency's construction of the statute it administers—but judicial review practices would otherwise be completely untouched. For convenience, this construction will be denominated the "Statutory Validity Approach" in this report.[27] The approach may embody a decidedly unconventional application of the term "presumption of validity"[28]; yet one can easily contemplate that courts might construe the Bumpers Amendment this way, out of indulgence for the manifest intentions of its sponsors (especially since the interpretation is less far-reaching, and thus less potentially disruptive, than others).[29]

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[24] In a colloquy with Senator Kennedy, 125 Cong. Rec. at S12150, the sponsor explained his reasons for the deletion:

> The term "de novo" could mean that the appellate court would have to try the whole thing over again.
>
> It is my thought that if the court needed additional evidence, it could remand the case to the agency or the administrative law judge, for the taking of additional testimony, if it were necessary, to reach a decision.
>
> . . . (Under the amendment, courts) would be forced to look at the evidence and would be forced to look at the application of the law based on that evidence, but such actions would not constitute, literally, a trial de novo.

Another Colloquy *id.* at S12154, is to the same effect:

> Mr. CHILES. . . . My understanding is that the amendment as first proposed would have required a trial de novo or sort of a new trial to take place on these matters when they went to the Federal District Court.
>
> Mr. BUMPERS. That is correct.
>
> Mr. CHILES. But that is not in there now. Is that correct?
>
> Mr. BUMPERS. The Senator is correct. De novo has been removed from the amendment.

[25] The full import of the prior "de novo" clause cannot be duplicated by any construction of the Amendment in its current form, because the "de novo" review formerly proposed would not have been confined to "rules and regulations." How much difference this makes is considered in Part V.A.2. below.

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[26] An effort to implement the proponents' intent runs into conceptual difficulty when one notices that the phrases "questions of law" and "questions concerning the rule's consistency with the underlying statute" have somewhat different connotations. Some would define a "question of law" as any issue that a court has competence to decide in a review proceeding—for example, the issue of whether the factual premises of a rule are supported by substantial evidence. To make sense out of the legislative history, however, it is necessary to ascribe a narrower meaning to "question of law"—although, as will be seen, its borders are not easy to trace.

One particularly confusing point is whether a challenge to the substance of a rule on constitutional grounds would raise a "question of law." (With respect to procedural challenges, see note 85 *infra.*) Ordinary usage would call for an affirmative answer. However, there is technically no principle requiring deference to agencies on constitutional issues. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973). Thus, these issues are somewhat peripheral to the Senators' main concerns and will not be discussed further in this context.

[27] If the Amendment is construed to affect only questions of a rule's consistency with the congressional will, it is admittedly hard to see how the agency can be expected to establish the "validity" of the rule by "a preponderance of the *evidence,*" as the Amendment literally requires. Whether a statute precludes the adoption of a regulation is a matter on which "evidence" is rarely, if ever, material. Yet this inelegance would also exist under any other construction of the Amendment. There appears to be no escape from the conclusion that the "preponderance of the evidence" language is simply an awkward way of expressing the thought that the defender of the regulation bears the risk of nonpersuasion, but need not demonstrate the regulation's validity "clearly and convincingly," as the original version of the Bumpers Amendment would have required.

[28] *See* note 91 *infra* and accompanying text.

[29] When so disposed, the courts will make due allowance for the imprecision that often plagues Congressional draftsmanship. *See, e.g.,* Train v. Colorado PIRG, 426 U.S. 1, 9-10 (1976); Cass v. United States, 417 U.S. 72, 78-79, 83 (1974) (" 'In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process.' "); United States v. Bass, 404 U.S. 336, 344, (1971).

As the Supreme Court remarked in construing another clause of Section 706 in Universal Camera Corp. v. NLRB, 340 U.S. 474, 489-90 (1951):

> "(T)he fair interpretation of a statute is often 'the art of proliferating a purpose' . . . revealed more by the demonstrable forces that produced it than by its precise phrasing. . . . We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.

However the above debate may be resolved, it seems clear that the Statutory Validity Approach constitutes the least common denominator of all possible constructions of the Bumpers Amendment. No matter how the Amendment is interpreted, agencies must expect to have to demonstrate to reviewing courts, without resort to deference doctrines, that the legal underpinnings of their rules are correct. This becomes especially clear if one pictures a case in which an interpretive rule is being reviewed. Under the APA, agencies do not have to issue an interpretive rule on the basis of evidence; nor do they have to follow any particular procedures in formulating the rule.[30] Unless the court proposes to evaluate the correctness of the rule—meaning the correctness of the interpretation it contains—it is hard to imagine any sense in which the rule could possibly be termed ''valid'' or ''invalid''. Since the Amendment, whatever else it may do, at least forbids courts to defer to agencies on questions of law, the merits of such a prohibition will be examined in some detail in Part IV.A. of this report.

B. How Closely Will Questions of Fact, Policy, and Procedure Be Reviewed?

Let it be assumed that the courts will not artifically define ''validity'' to refer only to legal questions, in the manner described above. How does the reviewing court apply the Amendment to a rule whose ''validity'' may depend on questions of law, fact, and policy?

There may be a number of possibilities, but it appears useful to consider two contrasting alternatives. One, which will here be called the ''Simple Burden-Shift Approach,'' assumes that the basis standards of review in Section 706(2) of the APA are unaffected by the Amendment. In other words, the rule would still be upheld if, on the record considered as a whole, it is not arbitrary and capricious, not lacking in substantial evidentiary support, not infected by procedural irregularity, etc. The Amendment would merely assign to the agency the burden of proof with respect to these review standards, and remove any ''presumption'' in the agency's favor. The other alternative, which may be called the ''Zero Deference Approach,'' would give the courts carte blanche to decide as an original matter all of the issues of ''validity'' that the regulation posed; that is, the court would supply its own answers to all of the questions the agency had resolved for itself earlier.

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[30] They are merely directed to publish the rule in the Federal Register after issuing it, 5 U.S.C. Sec. 552(a) (1976), a requirement that could hardly generate many controversies over the ''validity'' of the rule. (Even this modest requirement is of doubtful force after Morton v. Ruiz, 415 U.S. 199 (1974). In that case the Court refused to treat a Bureau of Indian Affairs policy as equivalent to a legislative rule because the Bureau had not complied with the Federal Register publication requirement. Then the Court went on to consider the policy as though it were an interpretive rule. Although deeming the Bureau's statutory interpretation unpersuasive in any event, the Court curiously failed to suggest that the interpretation should be ignored or discounted because it had not been published.)

(This could also be called a "De Novo" approach, but that term is avoided here because of the ambiguities it has already generated).

Plausible arguments can be made on behalf of either construction. The Simple Burden-Shift Approach is supported by the fact that the Amendment does not expressly repeal or qualify Section 706(2), in which are found such familiar standards of review as "arbitrary and capricious," "abuse of discretion," and "substantial evidence." Indeed, Senator Bumpers explicitly acknowledged that the substantial evidence test would continue to govern judicial review of the facts underlying a regulation,[31] and that concession can be interpreted to confirm that the judicial deference inherent in Section 706(2) continues in full force. The Simple Burden-Shift Approach also squares with the proponents' repeated declarations that the Amendment would have its primary impact upon "questions of law." The courts' current deference to administrative expertise on "questions of law" is a matter of judicial self-restraint, not of any command in the existing APA; thus, one may conclude, the amendment is not designed to affect the types of deference that the APA *does* prescribe in Section 706(2).[32]

On the other hand, the Zero Deference Approach—under which the reviewing court would make a fresh reappraisal of all the legal, factual, and policy issues raised by the rule—represents another plausible reading of the statute. It apparently corresponds to the most natural reading of the Amendment's language: "There shall be no presumption that any rule or regulation of any agency is valid," and the rule cannot stand unless "(its) validity is established by a preponderance of the evidence shown." The suggestion that the validity of the regulations must be "shown" or "established" through "evidence" can be read to imply that courts are being instructed to draw their own conclusions from the administrative record, rather than being instructed to appraise the rationality of the agency's conclusions.[33] Legislative history also gives some support to the Zero Deference Approach. If, as will be suggested in Part IV.B.1. of this report, the Simple Burden-Shift Approach would have very little impact on judicial review, one may contend that the Zero Deference Approach more fully realizes the Senators' intention to accomplish a major broadening of judicial review standards. Certainly the Senators who opposed the Amendment believed that it portended sweeping judicial second-guessing of agencies on technical and policy issues;[34] and, although their expressions of alarm carry only limited weight under customary principles of statutory construction,[35] the fact that the Amendment's proponents did not squarely deny this charge may appear significant. These factors might lead some courts to suppose that the Bumpers Amendment brings about a *pro tanto* repeal of Section 706(2) where rules and regulations are involved.[36]

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[31] 125 Cong. Rec. at S12146, S12150. Actually, the substantial evidence test does not apply to judicial review of most regulations. By and large, it is applicable in rulemaking situations only where a trial-type hearing is held; and after United States v. Florida E.C. Ry., 410 U.S. 224 (1973), few statutes can be construed as requiring such a hearing. The usual standard of review for facts underlying a rule is the "arbitrary and capricious" test. Ethyl Corp. v. EPA, 541 F. 2d 1, 37 n. 79 (D.C. Cir.), *cert denied,* 426 U.S. 941 (1976).

[32] If one opts for the Simple Burden-Shift Approach, further interpretive difficulties arise. The concepts of presumption and burden of proof, which attain critical importance under this Approach, are also subject to varying interpretations. Exploration of these ambiguities will be deferred until Part IV.B.2 of this report.

[33] The better view would seem to be that the word "evidence" should *not* be taken at face value, *see* note 27 *supra,* but one cannot assume that all courts will accept that view.

There is still another possible approach to construction of the Amendment that deserves at least passing discussion. Although the proponents of the Amendment often stated that they were concerned solely with "questions of law," they at times appeared to take an unusually broad view of the kinds of issues comprehended by that phrase. For example, Senator Bumpers has repeatedly referred to *NLRB v. Hearst Publications, Inc.*[37] as an example of the type of judicial abdication of duty that he would like to curb.[38] Yet the very holding of *Hearst* was that the controversy at issue there—the status of newsboys as possible "employees" under the labor laws— was not a question of law interpretation, but was rather a question of law application, or what is sometimes called a mixed question of fact, law, and policy. Other cases cited with disapproval by Senator Bumpers also implicated issues that usually turn as much upon policy judgments relegated to an agency's sound discretion as upon techniques of statutory construction.[39] If the proponents' evident desire to eliminate all deference on "questions of law" is considered in conjunction with their broad-ranging conceptions of what a "question of law" is, one arrives at an exceedingly broad statute. In other words, if courts read the legislative debates to stand for the proposition that all "mixed" questions, such as the question in *Hearst,* are "questions of law" on which the judiciary should never defer to administrators, we are indeed left with a statute that closely approaches what has here been called the Zero Deference Approach. Under such a statute, deference would apparently be accorded only to what may be called pure questions of fact—empirical perceptions that embody no element of legal judgment.[40]

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[34] *See, e.g.,* 125 Cong. Rec. at S12149 (Sen. Kennedy), S12151 (Sen. Ribicoff), S12155 (Sen. Muskie).

[35] National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 639-40 (1967); United States v. Calamaro, 354 U.S. 351, 358 (1957).

[36] A supporter of the Zero Deference interpretation would likely argue that the removal of the words "de novo" from the Amendment was merely intended to avoid forcing the courts to conduct their own evidentiary hearings on the validity of the rule. *See note 24 supra.* Instead, the argument would run, the Bumpers Amendment now directs courts to make a de novo appraisal of the rule on the basis of the existing administrative record.

[37] 322 U.S. 111 (1944).

[38] 125 Cong. Rec. at S412, S415, S12147. Actually, *Hearst* would not be governed by the Bumpers Amendment in any event, because it dealt with an adjudicative order rather than a rule or regulation. This fact need not alter the basic analysis, however, since the Court's reasoning would apparently have been unchanged if the NLRB had cast its decision in the form of a rule of general applicability.

[39] *See, e.g.,* 125 Cong. Rec. at S12146-47, where Senator Bumpers criticized courts for their deference in two *rate-setting* cases: Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800 (1973), and Giles Lowery, Inc. v. Department of Agriculture, 565 F.2d 321 (5th Cir. 1977).

As a variant of this last approach, one could hypothesize that the proponents intended only that *some* of the questions now viewed as "mixed" should be reclassified as "questions of law" and decided by the courts on a de novo basis. In other words, the Amendment may be seen as a response to the substantial body of case law in which "mixed" questions have been categorized as either "fact" or "law" issues and thereby assigned to agency or court for decision.[41]

If either of the constructions suggested in the preceding two paragraphs is adopted, the result will be a sort of hybrid combination of the Statutory Validity Approach and the Zero Deference Approach. Any given issue would be treated in accordance with one of these two approaches, the choice between them resting on whether the issue was preceived as "factual" or "legal" in nature. Since the Statutory Validity and Zero Deference Approaches will be analyzed in some detail below, separate discussion of these hybrid approaches seems unwarranted. One comment does seem important, however: In recent years the cases have virtually abandoned attempts to divide the universe of "mixed" questions into factual and legal components, presumably because they recognized the excessive rigidity and artificiality that such conclusional labels introduced. To reinstate the distinction now would breed no end of confusion and litigation as parties struggled with metaphysical arguments over which category applied to their particular questions.

In summary, if the courts construe the word "validity" in the Bumpers Amendment in such a manner as to implicate factual, policy, and procedural issues, they will have to reconcile the Amendment with the review standards of Section 706(2). Their resolution of the relationship between the two provisions may determine whether the Amendment turns out to be a fairly innocuous provision or a fundamental overthrow of the existing allocation of power between judicial and executive branches. As a first step toward clarifying the alternatives at stake, Parts IV.B.1. and IV.B.2. of this report will attempt to analyze the doctrinal implications of the Simple Burden-Shift and Zero Deference Approaches, respectively.

IV. WOULD THE AMENDMENT LEAD TO SOUNDER LEGAL RESULTS?

A. *Questions of Law*

We have seen that, under even its narrowest reading, the Bumpers Amendment would appear to require courts to give no weight to agency views when they decide whether a given regulation is consistent with the statute underlying it. Central to our inquiry, therefore, is the question of whether the elimination of this decisional factor would be desirable. The question may profitably be approached through an initial inquiry into the existing case law on the subject.[42]

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[40] *See generally* L. Jaffe, Judicial Control of Administrative Action 548-53 (1965).

[41] *See generally* 4 K. Davis, Administrative Law Treatise, Ch. 30 (1958).

1. The Courts' Present Practices

If the "presumption of validity" that is to be abolished by the Bumpers Amendment means the courts' practice of giving weight to agency constructions, the Amendment is aimed at a complex phenomenon on which there has been extensive judicial commentary. The primary justification for this approach is that agencies tend to be familiar with, and sophisticated about, statutes that they are charged with administering.[43] The expertise is assumed to result not only from the frequency of an agency's contacts with the statute, but also from its immersion in day-to-day administrative operations that reveal the practical consequences of one statutory interpretation as opposed to another. Hence the courts approach agency interpretations with a measure of respect that is distinct from, though not wholly divorced from, their assessment of the inherent persuasiveness of the agencies' arguments. Such deference to administrative constructions has been a feature of American law since its earliest days.[44]

Equally important, however, is the fact that the courts are quite willing to consider arguments that contradict the agency's viewpoint. In other words, the "presumption" of correctness is most definitely rebuttable. As stated in *Volkswagenwerk Aktiengesellschaft v. FMC:*[45]

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." NLRB v. Hearst Publications, 322 U.S. 111, 131; Unemployment Commission v. Aragon, 329 U.S. 143, 153-154. But the courts are the final authorities on issues of statutory construction, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385, and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the

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[42] Since a survey of these cases was presented in the author's prior study for the ABA Administrative Law Section, the following subsection of this report draws heavily from the corresponding discussion contained therein. *See* Woodward & Levin, *supra* note*, at 332-35.

[43] *See* Wilderness Soc'y v. Morton, 479 F. 2d 842, 866 (D.C. Cir.) (en banc), *cert. denied,* 411 U.S. 197 (1973).

[44] *See* Annot., 73 L. Ed. 322 (1928), which lists hundreds of federal and state court decisions recognizing the deference principle, dating back at least to United States v. Vowell, 9 U.S. (5 Cranch) 368, 372 (1809) (Marshall, C.J.).

[45] 390 U.S. 261 (1968).

> congressional policy underlying a statute." NLRB v. Brown, 380 U.S. 278, 291. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . ." American Ship Building Co. v. NLRB, 380 U.S. 300, 318.[46]

More specifically, the courts have proceeded over the years to develop criteria indicating where deference to an agency's construction of its governing statute is desirable and where it is not. Indeed, the principle of deference is not so much a "presumption" as a collection of rules of statutory construction, any of which may be applicable depending upon the circumstances of the particular case. In this fashion, the case law has yielded a set of considerations designed to assure that no agency interpretation receives more deference than it deserves.[47]

In the first place, courts have concluded that not all agency interpretations stand on the same footing. Special weight is given to a construction which the agency has followed since its governing statute was adopted,[48] especially if the agency participated in the drafting of the legislation.[49] A long-standing or continuous construction receives much more deference than a recently adopted one,[50] especially if a newly announced construction contradicts the agency's earlier view.[51] And an administrative construction may be discounted if the agency espousing it is not the department charged with administering the statute in question,[52] or if two agencies are in disagreement about the proper interpretation.[53]

One especially important factor in the decision of how much deference to accord is the presence or absence of congressional activity with respect to the administrative construction. If it is shown that Congress has implicitly or explicitly endorsed the agency's construction—such as by refusing to amend the construction out of existence, or by reenacting the statute in a manner indicating legislative agreement with the agency—the courts will recognize a heavy presumption in favor of the correctness of the administrative construction, because Congress's response is a strong indication that the agency's view is correct.[54] On the other hand, the "reenactment doctrine" is not applied in a mechanical fashion. If the court has reason to believe that Congress has reenacted a statute without paying attention to the agency's construction, or has not really focused on the issue, the presumption favoring the agency's view is weaker.[55]

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[46] *Id.* at 272.

[47] For an extensive collection of cases expounding these criteria, see Annot., 39 L. Ed. 2d 942 (1975).

[48] *See, e.g.,* Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137, 152-54 (1960); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

[49] *See, e.g.,* Miller v. Youakim, 440 U.S. 125, 144 (1979); Shapiro v. United States, 335 U.S. 1, 12 n. 13 (1948); United States v. American Trucking Ass'ns, 310 U.S. 534, 549 (1940).

[50] *Compare, e.g.,* United States v. National Ass'n of Securities Dealers, Inc., 422 U.S. 694, 719 (1975), *and* NLRB v. Boeing Co., 412 U.S. 67, 74-75 (1973), *with* Leary v. United States, 395 U.S. 6, 25-26 (1969), *and* Alexander v. Cosden Pipe Line Co., 290 U.S. 484 (1934).

[51] International Bhd. of Teamsters v. Daniel, 99 S. Ct. 790, 800-801 (1979); United Hous. Foundation, Inc. v. Forman, 421 U.S. 837, 858 n. 25 (1975); Morton v. Ruiz, 415 U.S. 199 (1974).

[52] Alaska S.S. Co. v. United States, 290 U.S. 256, 261-64 (1933); *cf.* United States v. Florida E.C. Ry., 410 U.S. 224, 236 n. 6 (1973).

[53] General Electric Co. v. Gilbert, 429 U.S. 125, 144-45 (1976).

The cases also demonstrate a concern with the comparative qualifications of court and agency in dealing with the subject at hand. In a very technical area, deference to agencies is most prominent.[56] On the other hand, courts are much less willing to defer to an agency interpretation when the meaning of the statute must be determined by reference to subjects in which courts have the greater degree of competence, such as when the statute must be construed by reference to the common law, the Constitution, or prior judicial precedents.[57] In this way the concept of agency expertise provides the basis for a pragmatic determination of which institution is more likely to be able to discern the correct result.

A somewhat different rationale for the court's approach was recently articulated by the Supreme Court in *International Brotherhood of Teamsters v. Daniel:*[58] "This deference is a product both of an awareness of the practical expertise which an agency normally develops, *and of a willingness to accord some measure of flexibility* to such an agency as it encounters new and unforeseen problems over time."[59] Here deference seems to derive not only from a perception of sophistication, but also from a commitment to comity, a conscious desire to achieve a practical accommodation between the judicial and executive branches of government by allowing the latter a measure of autonomy in administering its program. In this respect deference to administrative constructions may be analogized to the longstanding judicial policy of deferring to the legislature through a "presumption of constitutionality."[60] "A decent respect for a co-ordinate branch of government" is cited as the rationale of this latter form of deference.[61]

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[54] United States v. Rutherford, 99 S. Ct. 2470, 2476 & n. 10 (1979); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969); United States v. Correll, 389 U.S. 299, 305-06 (1967); Power Reactor Devel. Co. v. International Union of Elec. Workers, 367 U.S. 396, 408-09 (1961).

[55] SEC v. Sloan, 436 U.S. 103, 120-21 (1978); Zuber v. Allen, 396 U.S. 168, 192 (1969); United States v. Calamaro, 354 U.S. 351, 359 (1957).

[56] E.I. Du Pont de Nemours & Co. v. Train, 430 U.S. 112, 134 & n. 25 (1977).

[57] Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 41 n. 27 (1977); Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 268-70 (1960); SEC v. Chenary Corp., 318 U.S. 80, 89 (1943).

[58] 99 S. Ct. 790 (1979).

[59] *Id.* at 800 n. 20 (emphasis added).

[60] *E.g.*, Mathews v. De Castro, 429 U.S. 181, 185 (1976).

[61] Legal Tender Cases, 79 U.S. (12 Wall.) 457, 531 (1871).

This theme of comity would seem to be the best explanation for the doctrine[62] that courts should be especially deferential to administrative constructions enunciated while the agency members are implementing a new statute and trying to make it work for the first time. For although administrators may not have expertise when they confront a brand new regulatory statute, they do have a distinctive need for "breathing room" within which to address problems for which no one has definite answers—including judges.

Perhaps the most significant factor in the calculus, for present purposes, is this: The agency's chance of prevailing in court depends not only on factors relating to the nature of the administrative construction itself, but also on whether the other commonly used guides to statutory construction outweigh the agency's construction. If these other factors compel the conclusion that the agency is wrong, its interpretation will not be followed. Thus, an interpretation is rejected when it conflicts with the court's interpretation of the explicit language of the statute, with the legislative history, or with the manifest purposes underlying the statute.[63] The more clearly a statute's text, origins, or demonstrable purpose conflicts with an agency construction, the more likely the latter is to be overturned. Sometimes an agency construction is rejected largely because the court considers it to be inherently unreasonable and therefore unlikely to have been intended by the legislature.[64]

In summary, no matter how they may preface their opinions with praise for administrative wisdom, the courts in practice have carefully avoided treating administrative constructions of statutes as conclusive. The agency's views "are only one input in the interpretational equation,"[65] to be considered along with a number of other factors customarily used to determine Congress's intention. Since these other indices of statutory construction can rebut the "presumption", the deference principle is best seen as only the starting point of a court's analysis. Whether it will also be the ending point will depend on how much contrary evidence of legislative intent can be marshalled by the challenging party.

2. *Appraisal of the Deference Principle*

A preliminary question that must be addressed in evaluating the deference principle is whether deference to administrative constructions

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[62] United States v. American Trucking Ass'ns, Inc. 310 U.S. 534 (1940); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

[63] International Bhd. of Teamsters v. Daniel, 99 S. Ct. 790, 800 n. 20 (1979), Shea v. Vialpando, 416 U.S. 251, 262 n. 11 (1974); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745-46 (1973).

[64] SEC v. Sloan, 436 U.S. 103, 121 (1978); United States v. Cartwright, 411 U.S. 546, 550 (1973).

[65] Zuber v. Allen, 396 U.S. 168, 192 (1969).

More cynical observers have contended, however, that there is much less to the principle of deference than meets the eye.[66] Their critique—which extends to the entire range of scope-of-review doctrines, not merely those related to agency constructions of statutes—surely contains a measure of truth. A judge who is comfortable with an agency's results loses nothing by adding to his opinion the makeweight argument that he is obliged to give great weight to the agency's views; indeed, the argument gives him an effective means by which he can disclaim personal responsibility for the final result. Probably every judge exploits deference precepts from time to time in order to affirm a weakly supported ruling that he himself favors—just as every judge probably has occasions when he overrides those precepts in order to strike down a ruling that he finds objectionable. It has been recognized from the early days of the APA, and before, the flexible, creative implementation of scope-of-review principles should be expected (and, indeed, commended).[67] To the extent that the skeptical view of deference is an accurate description of reality, the Bumpers Amendment is obviously not necessary.

Yet this line of argument can only narrow—it cannot eliminate—the issue that Senator Bumpers has raised. The true extent of federal courts' deference to agencies is inevitably speculative.[68] No one can say with certainty that judges who profess deference to administrative officials do not sometimes mean exactly what they say.[69] Even if courts do at times ride roughshod over established deference guidelines, it does not follow that those guidelines have no impact in other cases, perhaps the majority of cases.[70] Furthermore, the skeptical view of deference leaves Senator Bumpers in an excellent position to argue, as he has, that his proposal would simply hasten the decline in deference that the skeptics have perceived.[71] In short, the challenged raised by Senator Bumpers can be decisively answered only if one assumes that deference rules do indeed influence results. The following discussion, therefore, takes the existence of deference for granted and appraises the justifications for the practice.[72]

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[66] *See, e.g.,* Gellhorn & Robinson, *Perspectives on Administrative Law,* 75 Colum. L. Rev. 771, 780-81 (1975) (suggesting that "the rules governing judicial review have no more substance at the core than a seedless grape"). Compare the remark by Irving R. Kaufman, Chief Judge of the Second Circuit, that "(d)espite our eminently proper obeisance to agency discretion, when we have sifted through all the usual techniques of judicial review and are still convinced that something is amiss, we do somehow find ways to balance agency discretion with some judicial valor." Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening,* 45 N.Y.U. L. Rev. 201, 209 (1970). In the same passage, however, Judge Kaufman does acknowledge his "reliance on . . . the expertise of the agency."

[67] *See, e.g.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488-89 (1951):

> A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata.

Accord, Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 90-91 (1944).

[68] For a notable attempt to measure the degree of deference manifested in judicial opinions, see Gardner, *Federal Courts and Agencies: An Audit of the Partnership Books,* 75 Colum. L. Rev. 800 (1975). Gardner found traces of deference in about half of the random sample of cases he studied. *Id.* at 821. Of course, he was in no position to determine whether judges really meant what they said in their opinions; and still less did his survey provide a basis for concluding that "too much" (or "too little") deference was being accorded.

The case law, as summarized in the preceding section of this report, itself contains the principal arguments on behalf of the review standards of the status quo. The rationales for deference expounded by the Supreme Court earlier this year in *Daniel*—the agency's "practical expertise" and its need for "flexibility"—simply cannot be dismissed as insubstantial. They should not be treated as conclusive, either, but, as we have seen, the courts do not do so. Instead, they have sought to develop criteria whereby the agency's interpretation will be accorded only as much weight as it deserves, and will be overridden when other tools of statutory construction demonstrate the error of the agency's position. To be sure, deference is sometimes carried to improper lengths; courts are as capable of reaching erroneous decisions in this realm as in any other. Nevertheless, the courts'

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[69] *See, e.g.,* McGowan, *Reflections on Rulemaking Review,* 53 Tulane L. Rev. 681 (1979). Only the diehard cynic could doubt the sincerity of Judge McGowan's concern over the legitimate scope of appellate review of agency rules. *See also* Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), *cert. denied,* 426 U.S. 941 (1976), where four other judges of the D.C. Circuit devoted more than a dozen pages to debating scope-of-review issues, an exercise that hardly bespeaks indifference to those issues.

[70] One may readily grant that appellate judges sometimes invade the theoretical province of the jury as fact-finder in ordinary civil and criminal cases; but what litigant would not prefer to arrive in the appellate court with the jury's verdict on his side?

[71] See 125 Cong. Rec. at S12146, S12147.

[72] A related criticism of scope of review doctrines has been that the state of the law is so confused as to be meaningless; there are so many contradictory decisions in this field, it is asserted, that one can cite respectable authority on either side of any case. This criticism seems overstated. The legitimate disagreements that may arise over the proper weight to be given the administrative construction are not dissimilar to arguments over how much importance to attach to legislative history, or subsequent Congressional action, or adjacent provisions of the statute. It would not be sensible to abolish any of these common guides to statutory construction simply because there sometimes is uncertainty over how influential each should be. The appropriate deference to be given to the agency's position may depend on so many variables that it cannot be captured in a few phrases, but the range of ambiguity is by no means so wide as to lack all content. More to the point, it is not nearly so wide as to generate the same results as the Bumpers Amendment, under which there would *always* be a *complete* lack of deference to agency views.

"relatively finely tuned" method of analyzing whether deference is warranted in particular situations seems far more likely to place administrative interpretations in proper perspective than the across-the-board judgment embodied in the Bumpers Amendment—that deference is *never* warranted.[73]

Senator Bumpers argued to the Senate, however, that any such deference must be rejected on principle, because "when a court affirms the interpretation of a statute which it would not have adopted as an original matter, it abdicates one of its most important functions."[74] He asked:

> Finally, why do we have a judiciary? The judiciary says that even if this is wrong, we will not disturb that ruling because of the presumption of expertise of the regulation writers . . .
>
> . . . They do not say "If there is a simple error and we disagree with their conclusion, we are going to reverse it." They say it has to be unreasonable . . .
>
> Under this amendment, the judiciary will simply be required to carry out exactly what their duty is: that is, where they would have reached a different conclusion, it is their duty to reach a different conclusion.[75]

Senator Morgan, another proponent, similarly remarked that under the Amendment "the courts would reclaim their responsibility under our system of Government—interpreting the law."[76]

But the court's practice of accepting administrative interpretations that are "reasonable" (or, as sometimes stated, have a "rational basis in law") should not be misunderstood. Courts do not say that an agency which has misinterpreted the law must nevertheless be affirmed if its construction was "reasonable" in the sense of being arguable. Rather, the deference doctrine instructs courts to accept administrative interpretations that are

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[73] *See* McGowan, *Congress, Court, and Control of Delegated Power,* 77 Colum. L. Rev. 1119, 1166 (1977).

[74] 125 Cong. Rec. at S12147.

[75] *Id.* at S12148. *See also id.* at S12146: "This amendment . . . would restore the courts to their normal law-interpreting and law-applying role in our system of government."

[76] *Id.* at S12153. These assertions are reminiscent of Senator Bumpers' appeal, during his speeches on earlier versions of the Amendment, to Chief Justice Marshall's famous pronouncement in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), that "(i)t is emphatically the province and duty of the judicial department to declare what the law is." *See* 122 Cong. Rec. 22012 (1976). Of course, Marshall understood the difference between saying that courts have final responsibility to decide a question and saying that they should give no weight to the position of a coordinate branch of government on that question. *See* note 44 *supra.* In context, after all, Marshall was referring in *Marbury* to the principle that the courts, rather than Congress, must finally determine whether federal legislation is constitutional. One would assume that Senator Bumpers does not take Marshall's quotation as indicating that the presumption of constitutionality of statutes should be abandoned.

"reasonable" in the sense that *they may very well be right.* It is a means of assisting courts that, faced with *uncertainty,* find themselves obliged to "seiz(e) everything from which aid can be derived"[77] and thus use the agency's position as a guide to discovering what is most likely the correct result.[78] The agency's construction is allowed to tip the scales because of factors such as those which have been identified: expertise and comity.

Insofar as one discerns in the deference principle a judicial policy of comity toward the executive branch, one must come to terms with what is, perhaps, the most plausible argument for the Bumpers position. The argument would be that, however much a policy of allowing flexibility to agencies may have been desirable at one time, the public interest now requires its abandonment because in recent years the bureaucracy has, as a general rule, far overstepped legitimate bounds in its regulatory activities.[79] One rejoinder is this: whether one agrees or disagrees with the "overregulation" premise, the Bumpers Amendment is an excessive response, because it would apparently forbid not only deference stemming from comity, but also deference rooted firmly and rationally in other factors such as demonstrable agency expertise.[80]

In any event, relying on the courts to curb "overregulation" is a questionable strategy. When a court refuses to accept an agency's construction of a regulatory statute, the usual consequence is that the statute will be construed more narrowly than the agency had urged. But this is not invariably the case. There are also situations in which a court rejects an agency's decision that the governing statute imposes limitations on administrative power—so that, as a result of the court's decision, regulation becomes more extensive rather than less so. A famous example is provided by *Phillips Petroleum Co. v. Wisconsin.*[81] Until 1954, the Federal Power Commission held that it had no jurisdiction over natural gas producers. *Phillips* held that the Commission's statutory construction was mistaken: natural gas prices charged by producers were indeed subject to regulation under the Natural Gas Act. Thus the *Phillips* decision led to more, not less, regulation. And it is not difficult to find other cases in which agencies have been told that they have misconstrued a statute and must promulgate new and more far-reaching regulations.[82]

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[77] United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.).

[78] This analysis helps one to understand the Supreme Court's frequently quoted remark that " '(t)o sustain the commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is a result we would have reached had the question arisen in the first instance in judicial proceedings.' " Udall v. Tallman, 380 U.S. 1, 16 (1965). At first glance this comment may seem to be a rather blatant invitation to judicial irresponsibility. On close examination, however, the remark states only what is self-evident: for if an administrative interpretation could be accepted only if it were the "only reasonable one," and only if it were the same conclusion that the court would have reached in any event, the deference doctrine would be completely meaningless.

[79] *See* 125 Cong. Rec. at S12150-51 (Sen. Domenici).

[80] The deference doctrine may rest in part upon policy factors that are rarely if ever mentioned in the case law. For example, one powerful pragmatic consideration supporting deference to IRS interpretive rules is that taxpayers often make important financial decisions in reliance on them. Who is to say that the considerable deference displayed toward IRS interpretations that "implement the congressional mandate in some reasonable manner," *see* United States v. Correll, 389 U.S. 299 (1967), does not derive in part from an awareness of this fact? *See* National Muffler Dealers Ass'n v. United States, 99 S. Ct. 1304, 1307, 1311 (1979) (dicta). And how could one justify a statute that absolutely forbids courts from taking account of it?

[81] 347 U.S. 672 (1954).

Today a mood in favor of "deregulation" is perceptible not only in the United States Senate but in a number of the agencies themselves. The FCC, for example, has proposed sweeping reductions in the obligations it now imposes on such diverse entities as independent common carriers, radio broadcasters, and cable television operators. Each of these proposals has met with resistance from certain entrenched interest groups—groups which can be expected to argue, if the proposed rules ever reach a reviewing court, that the Commission's new policies violate the Communications Act.[83] At the SEC, similarly, most of the Commission's major rulemaking ventures of late have been geared toward making regulation *less* extensive.[84] Parallel moves are occurring at other agencies. It would be ironic indeed if the courts were to stand in the way of this trend, using the Bumpers Amendment as an affirmation that they have far greater authority than administrators on statutory construction questions that may arise in this connection.

B. Questions of Fact and Policy

We have seen that the text of the Bumpers Amendment is not limited to questions of law, and may thus be construed as governing attacks upon the factual and policy underpinnings of a rule. We have also seen that these issues are currently subject to fairly restrained review under the "abuse of discretion" and "substantial evidence" tests of Section 706(2) of the APA. The Amendment may be construed either as perpetuating these tests (the "Simple Burden-Shift Approach") or overriding them (the "Zero Deference Approach"). In this section of the report we will consider, in separate discussions, whether the courts can be expected to produce sounder legal conclusions when reviewing rules under either of these two constructions.

Procedural challenges to a rulemaking proceeding would also fall within the domain of the Bumpers Amendment if the Statutory Validity Approach is not accepted. However, the APA already authorizes the courts to conduct plenary review of agencies' alleged violations of private parties' constitutional and statutory rights to fair procedures.[85] Consequently, many of the issues discussed in this section of the report have no relevance to procedural matters, and only sporadic references to those matters will be made.

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[82] *See, e.g.*, Office Employees Int'l Union Local 11 v. NLRB, 353 U.S. 313 (1957); Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663 (2d Cir. 1973); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971).

[83] Telephone interview with Robert Bruce, General Counsel, Federal Communications Commission, October 17, 1979.

[84] Interview with Benjamin M. Vandegrift, Attorney-Fellow, Office of the General Counsel, Securities and Exchange Commission, October 8, 1979.

1. *The Simple Burden-Shift Approach*

Under the Simple Burden-Shift Approach, we are dealing, by hypothesis, with a rule that will ultimately be set aside if it is arbitrary, capricious, an abuse of discretion, or (in formal rulemaking) unsupported by substantial evidence, but that will be sustained if it passes these tests. The Amendment makes a difference only in that it removes the "presumption of validity" concerning the rule and prevents the rule, when challenged, from being upheld under these tests unless its "validity is established by a preponderance of evidence shown." Analysis of this construction points toward the conclusion that such a revision of existing practice would have so little impact as to be virtually meaningless.

At the outset it is important to get a sense of the manner in which Senator Bumpers expects his proposal to operate. His fullest explanation appeared in his remarks in January:

> To correct this trend of power (accumulating in the bureaucracy), even to slow it, will be the work of not a few years. But a start can be made, and *the so-called presumption of regularity, by which the citizen challenging his Government must always play with a deck legally stacked against him,* is a good place to begin . . .
>
> . . . *The proposition that the Government is presumed correct, that a tie, so to speak, alway goes against the individual, is an alien tenet* deserving of a quick death. Let the Government, with its vast resources and superior knowledge, bear the burden of proof. *To be sure, the citizen should still have the burden of raising the issue of a regulation's validity,* by pleading or in some less formal way. *He can still be given the burden of going forward with the evidence.* But on the ultimate issue of whether an agency is lawfully within power delegated by Congress—itself only a creature of the people's Constitution, *it is wrong to give the servant an automatic edge in the guise of a "presumption."*[86]

There are several points to notice here. First, Senator Bumpers does not propose to shift the "burden of going forward with evidence" to the government during judicial review of rules. This statement is compatible with the language of the Amendment itself, which takes effect only "whenever the validity of any . . . rule or regulation is drawn in question . . . " Senator Bumpers' staff has confirmed[87] that, in its current form, the bill is not intended to affect the burden of going forward (or burden of production, as it is sometimes called). These disclaimers are important because the cases do sometimes characterize a challenger's burden of going forward in terms of a so-called "presumption of validity" attaching to the agency's action. The operation of this presumption is simple: when the record contains no evidence, or too little evidence, with which a court can decide whether the agency abused its discretion, infringed procedural rights, acted without sufficient knowledge, or whatever, the court will normally resolve its uncertainty in the government's favor.[88] But this type of "presumption of validity" could be eliminated only if Senator Bumpers were proposing to place the burden of going forward on the government. As just observed, that is not his intention. Indeed, it would be most difficult to justify a system in which the government was obliged to offer a refutation of every possible challenge to a regulation without the opponents' having first articulated and in some way substantiated their grievances.[89]

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[85] 5 U.S.C. Sec. 706(2)(B) (1976) (constitutional rights); *id.* Sec. 706(2)(D) (other procedural rights); *see* Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1027 (D.C. Cir 1979) (intensive review of compliance with procedural norms).

[86] 125 Cong. Rec. at S414-15 (emphasis added).

Second, the Senator is propounding two distinct conceptions of the "presumption" he does hope to eliminate. One is the fact that "a tie . . .always goes against the individual," or, in technical terms, that the challenger of the rule has the burden of persuasion. The other is that the agency has an "automatic edge," so that the "deck (is) legally stacked against" the challenger. This concept of the presumption implies something rather different: that the courts, out of respect for agencies' real or assumed expertise, or for some other reason, are reluctant to hold that the challenger's burden of persuasion has been met.[90] In this second sense, the presumption is analogous to the deference doctrine that has been discussed above in connection with questions of law.

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[87] Newman interview, *supra* note 22.

[88] This is the correct interpretation of several cases cited by Senator Bumpers in his speech, 125 Cong. Rec. at S12146-47, including Central Arkansas Auction Sale, Inc. v. Bergland, 570 F. 2d 724 (8th Cir. 1978); Mazalewski v. Truesdell, 562 F. 2d 701 (D.C. Cir. 1977); Maryland-National Capital Park & Planning Comm'n v. Lynn, 514 F.2d 829 (D.C. Cir. 1975); United States v. Eureka Pipeline Co., 401 F. Supp. 934 (N.D.W. Va. 1975).

[89] One can perhaps conceive of a system in which the challenger was merely expected to *identify* the issues he wanted to raise, whereupon the government would have to assume the initial burden of demonstrating that the rule was "valid" in that respect. But this system would simply breed opening briefs composed of sheer boilerplate and would thus be tantamount to placing the entire burden of production on the government. Perhaps this perception accounts for Senator Bumpers' apparent distinction, in the above quotation, between "the burden of raising the issue . . . by pleading" and "the burden of going forward with the evidence"—although one must question whether it is really "evidence" that the party with the burden of production would usually be advancing in this context.

[90] Senator Bumpers' recent remarks during the debate on S.1477 re-echoed his view that the Amendment would remove an artificial advantage now enjoyed by the bureaucracy: "Why should not the American citizen, the person who is regulated at least be on an equal footing with the agency? The cards have been hopelessly stacked against the regulated people in this country." 125 Cong. Rec. at S12148.

Strictly speaking, neither of these two challenged features of judicial review is a "presumption" as federal law now defines that term. Since 1975 the role of presumptions has been governed by Rule 301 of the Federal Rules of Evidence, which provides that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion . . . "[91] However, it is not unlikely that courts would overlook this semantic difficulty if they became convinced that either of these two "presumptions" was what the Amendment was really meant to abolish.[92] Accordingly, they will be evaluated on their merits.

It is hard to see how a mere shift in the ultimate burden of persuasion could change many outcomes. It could make a difference only in the occasional case where the court found that the arguments indicating that the rule *was* an abuse of discretion (for example) stood in exact equipoise with arguments indicating that it was *not* an abuse of discretion. In a few instances this may be the court's view; but, as a matter of common sense, one would suppose that in the usual situation the court, after hearing the parties' arguments, can readily decide that it either is or is not convinced that the appropriate review standards have been satisfied.

The essential weakness in the idea that a shift in the burden of persuasion could be significant is that terminology drawn from the law of evidence is not well suited for use in this context. When a judge is deciding whether a regulation violates a statutory mandate, or embodies unacceptable public policy, or is tainted with procedural irregularity, he will perhaps consult logic, experience, tradition, precedent, or his conscience[93]; these decisional tools can hardly be equated with the intellectual processes by which an evidentary dispute is resolved. Even insofar as the rule depends on the existence of certain facts for its validity, emphasis on allocation of the burden of proof is not very helpful. The party to whom it is allocated does *not* have the responsibility (or even the right) of tendering evidence to the court for its examination. There is no indication that the Bumpers Amendment repudiates the established administrative law principle[94] that a rule must stand or fall on the record that was before the agency when it made its decision. Indeed, Senator Bumpers expressly disclaimed an intention to change this principle.[95] Thus, the success or failure of the challenger's efforts depends exclusively on his persuading the court that the rule is defective when viewed in light of that existing record and pertinent law. It is doubtful that his chances would be very different if the risk of non-persuasion on this issue lies with the government.

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[93] *See* B. Cardozo, The Nature of the Judicial Process (1921).

[94] Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549 (1978); Camp v. Pitts, 411 U.S. 138, 143 (1973); Home Box Office, Inc., v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977); DeLong, *Informal Rulemaking and the Integration of Law and Policy,* 65 Va. L. Rev. 257, 267 (1979).

[95] *See* note 24 *supra. See also* 125 Cong. Rec. at S12171, where Senator Bumpers agreed with Senator Kennedy's assumption that "you do not intend to affect decisions as to what sort of rulemaking is required and what type of record is necessary."

More plausible, at least superficially, is the assertion that an agency should not be allowed to rely on a "presumption of validity" as a factor entitled to substantial weight in the decision as to whether the pertinent standards of review have been met. If this is the target of Senator Bumpers' challenge, however, he is attacking a phenomenon that does not exist. Administrative law does not recognize a doctrine of deference over and above the review standards of Section 706(2)—standards which, if the Simple Burden-Shift Approach is followed, would continue to apply to rulemaking review even if the Amendment is enacted. Certainly the courts are deferential when they deal with agencies' factual determinations and discretionary choices, but the deference is based on statutory criteria like the "arbitrary and capricious" test or the "substantial evidence" test. It does not imply that a "presumption of validity" is being weighed in the scales, to the detriment of the party challenging the rule.[96]

In these respects the deference principle in the realms of fact and policy occupies a doctrinal posture that is slightly different from the corresponding principle for questions of law. For legal questions, the APA does not expressly impose any restrictions on the scope of judicial review. Its silence in that respect conforms to the generally accepted position that "courts are the final authorities on issues of statutory construction."[97] Thus, as we have seen in Part IV.A. above, judicial deference to administrative interpretations of a statute is essentially self-imposed. With respect to factual and policy matters supporting a rule, however, the courts are not seen as primary decisionmakers. Their function is to *review* these underpinnings of the rule, and the APA allows them to set the rule aside only if the agency's determinations are "arbitrary and capricious."

Assuming then, that the *standards* of review in factual and policy areas remain unchanged, there is no particular reason to expect that abolition of the "presumption of validity" in those areas will make a meaningful contribution towards the curtailment of "overregulation."

2. *The Zero Deference Approach*

If, on the other hand, the Bumpers Amendment is construed to rescind deference to agencies on all legal, factual, and policy questions touching on the validity of a rule, one can hardly quarrel with the appraisal of Senator Culver, who cautioned that the Amendment "would do nothing less than repeal more than 30 years of experience in the area of administrative law and nearly 200 years of common law practice."[98] Indeed, the Amendment would accomplish so complete a departure from prevailing separation-of-powers principles that the student of administrative law would virtually be left without any point of reference from which to critique it. It would be as though an evidence scholar were asked to comment on the desirability of doing away with trials.

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[96] Several of the cases cited by Senator Bumpers in his speech, although making passing references to a "presumption of validity," appear to have used that phrase only by way of loosely characterizing the review standards of Section 706(2). *E.g.,* Giles Lowery, Inc. v. Department of Agriculture, 565 F. 2d 321 (5th Cir. 1977) (describing substantial evidence review of agency rate-setting); Certified Color Mfrs. Ass'n v. Mathews, 543 F.2d 284, 293 (D.C. Cir. 1976) (describing abuse of discretion test).

[97] Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968).

One can say, however, that the Zero Deference approach to the Amendment would be a fundamental break with the intentions that have prompted earlier Congresses to authorize agency policy-making in the first place. The rules that raise this question are so-called "legislative" rules—rules that are "not merely interpretative (but) designedly creative in a substantive sense."[99] In this situation, Congress has literally delegated a portion of its standard-setting power, and through that delegation "Congress entrusts to the (agency), rather than to the courts, the primary responsibility for interpreting the statutory term."[100] Such a situation exists when, for example, an administrative agency implements a statute by issuing rules that it believes will serve "the public convenience, interest or necessity,"[101] or by setting rates that it deems "just and reasonable,"[102] or by promulgating regulations "to carry out the purposes of this statute."[103] In any of these situations, the purposes of the underlying legislation would be undermined in a quite fundamental way if the regulations could be upheld only where the

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98. 125 Cong. Rec. at S12156.

99. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 37 n. 40 (1976).

100. Batterton v. Francis, 432 U.S. 416, 425 (1977); *see* 2 K. Davis, *Administrative Law Treatise* Sec. 7:8 (2d ed. 1979): Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis,* 58 Harv. L. Rev. 70, 106-07 (1944).

It has been argued that a scope-of-review statute like Section 706 ought to spell out the analytical steps that courts should use in reviewing the permissibility of policy choices that an agency makes when exercising delegated power. Such a statute presupposes that the first step in judicial review should be to identify precisely which issues are governed by this series of inquiries, and which are governed by other tests. *See* Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review,* 1977 Ariz. St. L.J. 537, 553-55, 558-60. The question whether a structured scope-of-review statute of this kind would improve the comprehensibility and consistency of judicial review practices, as its proponents believe, may well deserve serious study. But such a *clarification* of prevailing standards of review is quite different from an attempt to make radical *alterations* in those standards, as the Bumpers Amendment contemplates.

101. *E.g.,* Federal Communications Act Sec. 309, 47 U.S.C. Sec. 309 (1976); *see* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 814 (1978) (upholding FCC cross-ownership regulations as reflecting "a rational legislative-type judgment").

102. *E.g.,* Interstate Commerce Act Sec. 15(1), 49 U.S.C. Sec. 15(1) (1976).

103. *E.g.,* Truth in Lending Act Sec. 105, 15 U.S.C. Sec. 1604 (1976), *discussed in* Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369-72 (1973).

agency persuaded a reviewing court "by a preponderance of the evidence" that the regulation was "right."[104]

The legal results of this approach can also be appraised in more pragmatic terms. Plenary judicial review of all regulations would clearly impair the effectiveness of the many substantive statutes that become the subjects of administrative rulemaking. It would lead to inferior regulation because courts simply do not have agencies' constant involvement with administration of the various programs, let alone agencies' technical sophistication. The APA standards of review aim at a balanced scheme whereby the detached perspective of judicial generalists complements the experience and knowledge of agency specialists.[105] A system of review that vests judges with primary responsibility for both functions cannot be as successful. Whether or not Congress could effectively forbid court to rely on agency expertise in factual and policy areas,[106] an effort to do so would be quite ill advised.

V. PRACTICAL CONSEQUENCES OF THE AMENDMENT

Up to this point, our analysis has focused upon the quality of the "outputs" of the Bumpers Amendment—the legal results that can be anticipated under various constructions of the Senate's proposal. Yet the Amendment must also be judged by its likely effects upon the *process* by which rules are drafted, issued, and ultimately reviewed. The task of making that assessment is complicated by the impossibility of knowing what construction the courts will eventually place upon the Amendment. Nevertheless, the effort must be made.

A. *The Decline of Rulemaking*

If the Bumpers Amendment is enacted, the first and most obvious consequence that can be predicted is a decline in the role of administrative rulemaking at the federal agencies. In a sense, of course, this is precisely what the Senate proponents of the Amendment favor, and what they believe their constituents desire. On closer examination, however, the consequences of such a trend are likely to appear much less attractive. Broadly speaking, two types of undesirable results can be predicted: a loss of guidance to the public if fewer regulations (or less authoritative regulations) are issued; and a loss of regulatory efficiency and fairness if agencies turn from rulemaking to alternative types of governance.

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[104] Although agencies' reservoir of experience and sophistication in their respective fields gives weight to these observations, the point being made in this paragraph is not logically dependent upon the existence of expertise (whether real or "presumed") at all. Free substitution of judicial for administrative judgment in these realms would offend the statutory scheme in and of itself. *See* McPherson v. Employment Div., 285 Ore. 541,591 P. 2d 1381, 1386 (1979) (Linde, J.) An analogy may be drawn to a finding of negligence by an ordinary civil jury. Except in extreme cases, the appellate court is expected to defer to that finding—not because the jury's opinion about how a reasonable person would act reflects "expertise" (in any but a fictional sense), but because the system designates the jury as primary decisionmaker.

[105] For a carefully articulated statement of the manner in which a reviewing court can, under current law, exercise a high degree of supervision over rulemaking activities without attempting to match the administrators' competence in highly technical areas, see Ethyl Corp. v. EPA, 541 F. 2d #1, 135-37 (D.C. Cir.), *cert. denied,* 426 U.S. 941 (1976).

[106] *Cf.* Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 91 (1944): "The respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence cannot be legislated away."

1. Uncertainty

Regulations serve as a guide to those who are seeking to comply with the law. The principles which determine how a regulation will fare in court cannot help but determine, also, the confidence that citizens will be inclined to place in such regulations when they plan their own course of action. Millions of businesses, associations, state and local government units, and individuals depend on agency-published rules for guidance as they carry on their manifold contacts with the federal government. To declare that federal regulations should have no weight is tantamount to saying that people should decide how to comply with federal law by consulting only the language of statutes themselves. It is not at all clear that the Senators who voted for the Bumpers Amendment would have desired, if they had thought about it, to promote such uncertainty concerning the law.

The case of tax regulations brings out the problems in sharp terms. The contemporary complaint about "overregulation" is seldom if ever voiced with regard to the Internal Revenue Service and the Department of the Treasury. On the contrary, taxpayers depend heavily on tax regulations in their planning. Companies entering into a business transaction generally expect that tax consequences will be involved and urgently need to know, with adequate certainty, what those consequences will be. In fact, the demand for tax regulations outruns the supply.[107] Often, pressure on the Treasury Department to publish such rules can be attributed to a conscious decision by the relevant committees of Congress to leave an ambiguity in the Code, so that the Department can work out a solution by regulation.

The need for rulemaking is so manifest in this context that one could reasonably expect the Service to promulgate some rules, as a public service, even if the Bumpers Amendment is enacted. The problem, however, would be that the regulation's lack of authoritative force might frequently render it useless from the taxpayer's standpoint. Inability to secure sufficiently reliable advice from the Service might well lead many trade associations—and individual firms, if powerful enough—to the one place where a definitive decision could be obtained: the tax-writing committees of Congress. Such heightened flow of pleas for legislative relief would be an ironic consequence of the Bumpers Amendment, which passed the Senate after its sponsor argued that the courts must assume the responsibility for combatting overregulation because Congress is too busy to handle the job.[108]

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[107] Telephone interview with David Brennan, Deputy General Counsel, Department of the Treasury, October 17, 1979.

The burdens of heightened uncertainty would not be confined to the field of taxation. Naturally, in other areas one could expect to see agencies deciding that they simply will not promulgate regulations that might (depending on how the Bumpers Amendment is ultimately construed) be given no weight in the event of a court challenge. Even where rules were issued, profound uncertainty would of necessity prevail while court review proceedings ran their course. The problem here would arise both because more intensive judicial review would take longer to perform, and because the broadened scope of review would augment the chance of reversal. Again, such reversals are precisely what Senator Bumpers is seeking; but one cannot help wondering whether the diminution in the total quantum of "regulation" is worth the costs of uncertainty.

Not least among those who would bear the costs of uncertainty are the agencies themselves. The Bumpers Amendment poses a substantial obstacle to any agency's ability to plan a coherent regulatory program. This is a further irony of the bill, for several other "regulatory reform" proposals pending in Congress seek to *encourage* more careful planning by agencies (through such devices as regulatory analyses, agenda, deadlines, and planning offices).[109] Interference with agency planning must be counted as an important disadvantage of the Amendment. It is true that a number of agencies are unpopular on Capital Hill today; but at any given time, confusion about the scope of their programs is in the interest of no one.

2. *Alternatives to Rulemaking*

The Bumpers Amendment can also be expected to have a negative impact on rulemaking in the sense that agencies will have an incentive to implement their policies through devices other than a "rule or regulation." Assuming that the Bumpers Amendment is addressed to the same types of agency action that are commonly referred to as "rules",[110] the potential for

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[108] *See* 125 Cong. Rec. at S12148 (Sen. Bumpers) (correction of the problems by legislative veto is impractical because "everyone of us is working 15 and 16 hours a day to keep up with what is going on in committee and on the floor (so that) we cannot exercise even 10 percent of our oversight responsibilities now").

[109] These include the Ribicoff bill, S. 262, 125 Cong. Rec. S858 (daily ed. Jan. 21, 1979), and the Administration bill, S. 755, 125 Cong. Rec. S3338 (daily ed. March 26, 1979). The Administration bill has also been introduced in the House as H.R. 3263.

[110] That assumption is actually rather questionable. The APA does not define the word "regulation". It does define "rule" in 5 U.S.C. Sec. 551(4) as follows:

> The whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includ(ing) the

such evasion is broad. Where only a construction of regulatory statute is involved, officials would presumably have a number of alternative media by which they can commit their policies to paper, such as administrative manuals, no-action letters, press releases, and private letter rulings. Where the agency proposes to exercise delegated power, on the other hand, the obvious alternative to a rulemaking proceeding is adjudication.

The choice between rulemaking and adjudication calls for special comment. The Bumpers Amendment does not appear to alter agencies' broad discretion under existing law[111] to develop their programs through case-by-case adjudication rather than rulemaking. One must anticipate, therefore, that the Amendment would prompt many agencies to forsake rulemaking for an alternative approach for which the standard of review would remain untouched. Yet such a development would be most unfortunate. Courts and commentators have long called attention to the benefits of rulemaking, as opposed to case-by-case adjudication. By developing policies through the formulation of regulations having general applicability, an agency can, among other things, (1) investigate conditions in an industry as a whole rather than confining its inquiry to the situation of the individual respondent; (2) allow all interested persons to participate on an equal basis; (3) escape the delay and expense of bringing multiple proceedings against various affected parties; and (4) avoid prejudicing the person who is the first to be subjected to a new prohibition that has not yet been directed at his competitors.[112] Anomalously then, the Bumpers Amendment exerts indirect pressure on the agencies to move in a direction diametrically opposed

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approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accountings, or practices bearing on any of the foregoing.

Unfortunately, the case law construing this definition is in considerable disarray. *See* 2 K. Davis, Administrative Law Treatise Secs. 7:1 to 7:4 (ed ed. 1979). The reason is simple: no operative section of the APA requires a definition. The section that comes closest is the "rulemaking" provision, 5 U.S.C. Sec. 553, but that provision exempts "interpretative rules" and "general statements of policy," and most of the cases concern themselves with the scope of that exemption. *See generally* Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements,* 75 Mich. L. Rev. 520 (1977). When courts are confronted with the Bumpers Amendment, they will be entering almost unexplored territory. They may read Section 551(4) literally, covering any "agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy," in which case the reach of the Bumpers Amendment will be virtually infinite. Or the courts may define "rule or regulation" in accordance with ordinary usage (as Senator Bumpers appears to have done). Or they may do something else. Thus the extent to which agencies will ultimately be able to avoid the Amendment by using something other than a "rule or regulation" is unknowable at this juncture.

[111] NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974); Chisholm v. FCC, 538 F. 2d 349, 364-65 (D.C. Cir.), *cert. denied,* 429 U.S. 890 (1976).

[112] *See, e.g.,* National Petroleum Refiners Ass'n v. FTC, 482 F. 2d 672, 681-84 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974); K. Davis, Administrative Law Treatise, Sec. 6.15 (Supp. 1970).

to the one that prominent administrative law authorities have for years been urging agencies to pursue.

A separate question is whether a trend away from rulemaking would serve the purposes of the Amendment itself—namely, reduction of deference to agencies in judicial proceedings, and ultimately reduction of agencies' intrusion into citizens' lives. Some agencies will probably be able to accomplish about as much with other devices as with rules; other agencies will find that their freedom has genuinely been constrained, in that rulemaking, which they would otherwise regard as the optimal regulatory device, will be subject to the Amendment. But in either situation, there seems to be no logical basis for the Amendment's distinction between "rules and regulations" and other devices.

B. *Impact on the Agency Rulemaking Process*

Even though the Bumpers Amendment appears to create strong incentives for agencies to use regulatory devices other than rules, one can hardly expect them to abandon rulemaking entirely. Accordingly, it is relevant to inquire whether the Amendment would lead agencies to alter their methods of formulating rules, and, if so, whether the change would be beneficial or otherwise. The importance of this inquiry becomes apparent when one recognizes that insofar as the mechanics of the process are transformed at all, the alteration will probably be greatest at the agency level rather than at a subsequent (i.e., judicial) level.[113]

It is reasonable to expect that officials will be more concerned about the prospects of judicial reversal and will react in some way to this threat. The question is whether their response will be a constructive one.

Proponents of the Amendment argue that rigorous judicial review will have the salutary effect of inducing bureaucrats to prepare regulations more carefully and conservatively.[114] The argument is not completely without force, but it greatly exaggerates the extent to which one can reasonably rely on judicial review as a tool for inducing any particular kind of change at the agency level. Although the threat of judicial reversal is not insignificant in agencies' eyes, the likelihood that it will occur in the case of any given regulation is often wildly unpredictable, and so are the grounds on which the courts may predicate such a reversal. For this reason, even though the Amendment may heighten the *in terrorem* threat inherent in the prospect of judicial intervention, it does not provide agencies with clear directions on how to avoid that outcome. At the same time, the factors which now lead agencies to promulgate rules will not disappear simply because the Bumpers Amendment has been enacted. Regulations are normally issued because the agencies perceive a Congressional mandate to issue them; or because agency members feel a conscientious commitment to act as they do; or because of the demands of some outside group that expects to benefit from the new rules. These latter considerations ordinarily impinge on agencies as forcibly, or more forcibly, than any calculus about the chances of prevailing in the courts.[115]

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[113] This is a point that seems to have been overlooked by some opponents of the Amendment, who apparently anticipate that courts will be forced to conduct full evidentiary hearings concerning the validity of rules, duplicating the steps taken by the agency. *See, e.g.*, 125 Cong. Rec. at S12152 (Sen. Dole), S12156 (Sen. Muskie). That concern appears to be unfounded, for, as previously discussed, the Amendment apparently preserves the principle that a rule, if it requires a factual foundation to be sustained, must be judged on the basis of the record that was before the agency. *See* notes 94-95 *supra* and accompanying text. Thus, although courts may find themselves taking a closer look at the record—particularly if the Zero Deference Approach or a variant of it is adopted—the contents of the record will be affected only if participants in the rulemaking process act differently while the rule is pending before the agency.

[114] *E.g.*, *id.*, at S12146 (Sen. Bumpers), S12151 (Sen. Domenici), S12153 (Sen. Morgan).

In this environment of conflicting pressures, the agencies may respond to the Amendment not so much by promulgating narrower regulations as by conducting more complex rulemaking proceedings, holding more oral hearings, and generating lengthier records, in order to assure that the rule's "validity (can be) established by a preponderance of the evidence shown."[116] These defensive measures can be expected to entail a good deal of overkill, for an agency's assessment of the danger of reversal is always speculative, and the agency has a strong temptation to engage in what would, in retrospect, be seen as excessive precautions. Such an increase in the complexity of rulemaking activities would appear to be sharply contrary to the underlying purposes of the Amendment. If the proceeding becomes more cumbersome, it is likely to be less accessible, in practical effect, to the small businessmen and individual citizens whom Senator Bumpers desires to assist. On the other hand, the relatively strong and well-financed interest groups, which already manage to present their case effectively to the agencies and the courts when necessary, will be able to exploit their existing advantages more effectively if the Amendment is added to their arsenal. Thus, although proponents of the Amendment contend that the burden of proof should rest with the government rather than with relatively powerless groups that lack access to the "resources" enjoyed by federal agencies,[117] the Amendment may actually aggravate whatever inequities are now attributable to disparities in the firepower of the various contending parties.

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[115] Nor does the Amendment change the fact that, at least in the larger agencies, the personnel who draft regulations scarcely have to worry about whether courts will uphold them, since any litigation will be handled by the general counsel's office.

[116] This response can be foreseen even if the Amendment is construed to affect primarily the courts' review of "legal" issues. It takes no great sophistication about the judicial process to recognize that the facts of a case often have a profound effect on the resolution of controversies that, analytically, involve "questions of law" in the purest sense.

[117] *See, e.g.*, 125 Cong. Rec. at S12146 (Sen. Bumpers), S12153 (Sen. Morgan).

The foregoing analysis can be restated in a manner that suggests some broader conclusions about the wisdom of the Bumpers Amendment in comparison with other current reform proposals. Senator Bumpers has a point when he argues that significant segments of our society feel powerless and unable to make a meaningful contribution to the ever-evolving regulatory scene. He is also correct in suggesting that the quality of agency rules often suffers from a lack of insight into the needs and desires of the persons being regulated. But, as we have seen, revision of the scope of judicial review is a markedly inefficient response to these deficiencies. Less ambitious regulation is one possible reaction, but more complicated proceedings are just as likely.

A more fruitful response to these deficiencies would seem to be improvement of the excluded groups' ability to participate at the agency level, before the primary decisionmakers have made up their minds. This, in fact, is the strategy embodied in some of the other "regulatory reform" bills pending in Congress.[118] The precise mechanisms proposed in these bills can be criticized on various grounds, but the underlying approach seems much more sound than the Bumpers approach. Courts are not well equipped to lead a regulatory reform movement. Judicial review works best when it is invoked to curb departures from the body of procedures that the legislature has ordained; the role of the Congress should be to institute whatever changes are needed in the APA rulemaking procedures themselves. Rationalization of the rulemaking process at its roots may be a step towards the ideal of making that process more affordable and more fully available for all. Indeed, if that goal is advanced, regulated persons will be better positioned to resort to the judicial system where necessary—a more promising benefit, from their standpoint, than the perhaps illusory advantages of abolishing an alleged "presumption of validity."

C. *Impact on the Courts*

We have already noted that the Bumpers Amendment is unlikely to lead to full-blown evidentiary hearings in court concerning the validity of a rule. Nevertheless, the Amendment can be expected to add appreciably to the workloads of the federal courts.[119] One can anticipate more filings;

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[118] These include the Kennedy bill, S. 1291, 125 Cong. Rec. S7126 (daily ed. June 6, 1979), and the Ribicoff and Administration bills cited in note 109 *supra*.

[119] By its terms the Amendment controls the scope of review not only in federal courts but also in the courts "of any State." This feature of the Amendment may appear peculiar, but it is not necessarily improper: the private rights protected by the APA may be enforced in any "court of competent jurisdiction" if Congress has not provided a forum for review. 5 U.S.C. Sec. 703 (1976). The issues of federalism posed by this aspect of the Amendment are interesting, but their practical significance is nil. Although state-court review of federal agency action is not unprecedented, *see* Seaboard Air Line R.R. v. Daniel, 333 U.S. 118, 123 (1948), it is certainly rare. Research has failed to uncover even one reported decision in which a state court has explicitly applied Section 706 to the actions of any federal agency. Indeed, a suite in state court against a federal officer or agency is almost invariably removable to federal court. 28 U.S.C. Sec. 1442 (a)(1) (1976); *see* Willingham v. Morgan, 395 U.S. 402 (1969). Thus, it is the impact of the Amendment on federal courts that must be examined here.

more challenges to rules in the course of litigation that would have reached the courts anyway; and more exacting scrutiny of a rule when the court actually proceeds to make its decision. The size of the increment would vary depending on what interpretation of the Bumpers Amendment is adopted, but is likely to be substantial no matter how the Amendment is construed.

The Amendment can also be expected to aggravate a nagging administrative problem that has troubled the judiciary for some time. The federal courts are not fungible. For this reason, opposing interest groups seeking review of rulemaking proceedings often engage in a frantic "race to the courthouse," each striving to secure a forum that it considers favorable. Courts have experienced enormous difficulty resolving these struggles, and it is widely believed that the problems are unsolvable without Congressional intervention (which is not now in sight).[120] The Bumpers Amendment would probably make these venue battles even more common and more heated, since the circuit that ultimately assumed jurisdiction would have broader freedom to overrule agencies' judgments. It is questionable policy to vest plenary, or at least appreciable greater, review powers in "the courts" without taking account of the problems of fairness that must arise when more than one court is asked to exercise those powers over a single rule.

D. *Confusion Surrounding the Amendment Itself*

The numerous ambiguities lurking in the brief text of the Bumpers Amendment are themselves a factor that Congress ought to weigh before proceeding to enact it. Over and above the substantive litigation that the Amendment aims to generate, one can foresee years of uncertainty and conflict in the agencies and courts concerning the Amendment's own meaning.

Among the problems of construction that have been highlighted in this report are the following:

1. In repudiating any presumption of "validity" for rules and regulations, does the Amendment refer only to questions as to whether the agency has acted within its statutory authority?
2. If not, what does "validity" mean?
3. If the Amendment deals only with "questions of law," what *is* a question of law? (This is a problem with which the courts struggled unsuccessfully for many years before the term passed into disfavor. If the Amendment revives it, one can anticipate an endless series of controversies over whether any given issue is a "question of law" in light of its being related in some way to the words of a statute or of the Constitution.)
4. If the Amendment deals with fact and policy questions, how does it square with Section 706(2) of the APA?

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[120] *See, e.g.*, United Steelworkers of America v. Marshall, 592 F. 2d 693 (3d Cir. 1979); APGA v. FPC, 555 F. 2d 852 (D.C. Cir. 1976); National L.J., Aug. 6, 1979, at 7.

5. When a rule or regulation raises primarily legal or policy issues, how can its validity possibly be established "by a preponderance of the evidence"?

6. What does the phrase "rule or regulation" mean? (This question probably cannot be settled in a single case or a few cases. It may require a huge number of lawsuits questioning whether a particular form of agency action falls within the definition.)

7. What "presumption" does the Amendment purport to eliminate? Is the agency to be charged with a burden of production, to be assigned the burden of persuasion, to be stripped of the deference that it hypothetically enjoys over and above existing standards of review, or to be affected in some other way?

There may be other interpretive problems not canvassed in this study.[121] But those already recited should be sufficient to suggest that the Amendment exceeds that point beyond which Congress cannot responsibly allow ambiguity to remain in a bill (perhaps in the hope that the courts will make sense out of it somehow). A provision that is as permeated with genuine uncertainties as the Bumpers Amendment ought to be completely rewritten—assuming that it deserves to be enacted in the first place.

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[121] It is perhaps appropriate to note that the one significant segment of the Amendment which has not yet been addressed herein—the proviso clause—also raises its share of perplexities. The proviso reads as follows:

> (I)f any rule or regulation is set up as a defense to any criminal prosecution or action for civil penalty, such rule or regulation shall be presumed valid until the party initiating the criminal prosecution or action for civil penalty shall have sustained the burden of proof normally applicable in such actions.

First, one must wonder why this provision is necessary. Surely it is rare—it may be completely unprecedented—for the government to initiate prosecutions or civil penalty actions against individuals who have a colorable defense of good faith reliance upon a rule or regulation of a federal agency. Moreover, if the statute underlying the prosecution or penalty action authorizes such a defense, why would that defense vanish if the court should find, after the government has "sustained its burden of proof" (whatever that may mean), that the regulation is invalid? If a good faith reliance defense is to have any meaning, why would not the mere existence of the regulation satisfy it?

REPORT IN SUPPORT OF RECOMMENDATION 79-7

(As published in: Duke Law Journal, Vol. 1980, No. 1,
February 1980)

APPROPRIATE LIMITS ON PARTICIPATION BY A FORMER AGENCY OFFICIAL IN MATTERS BEFORE AN AGENCY*

THOMAS D. MORGAN**

I. INTRODUCTION
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  A. *The Pre-1962 Legislation*
  B. *Recognition of the Need for Reform*
  C. *The 1962 Legislation*
  D. *Developments Between 1962 and 1978*

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* This Article is based on a report prepared for the Administrative Conference of the United States. The views expressed herein are personal opinions of the author and are not necessarily those of persons interviewed, the Administrative Conference of the United States, or the *Duke Law Journal.*

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

ABA CODE OF PROFESSIONAL RESPONSIBILITY (1978) [hereinafter cited as ABA CODE];

COMMITTEE OF CONFERENCE, CONFERENCE REPORT, ETHICS IN GOVERNMENT ACT OF 1978, S. DOC. NO. 127, 95th Cong., 2d Sess. (1978) [hereinafter cited as S. DOC. NO. 127];

SENATE COMM. ON GOVERNMENT OPERATIONS, 1 STUDY ON FEDERAL REGULATION: THE REGULATORY APPOINTMENTS PROCESS, S. DOC. NO. 25, 95th Cong., 1st Sess. (1977) [hereinafter cited as S. DOC. NO. 25];

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF LAWS, CONFLICT OF INTEREST AND FEDERAL SERVICE (1960) [hereinafter cited as BAR REPORT];

COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, WHAT RULES SHOULD APPLY TO POST-FEDERAL EMPLOYMENT AND HOW SHOULD THEY BE ENFORCED?, REP. NO. B-103987, (1978) [hereinafter cited as GAO REPORT];

A. KNEIER, SERVING TWO MASTERS: A COMMON CAUSE STUDY OF CONFLICTS OF INTEREST IN THE EXECUTIVE BRANCH (1976) [hereinafter cited as COMMON CAUSE STUDY];

Committee on Legal Ethics, D.C. Bar, Proposals for Amending the Disciplinary Rules of Canon 9 of the Code of Professional Responsibility, *reported in Former Government Attorneys in Private Practice: Final Legal Ethics Committee Proposals for Comment*, DISTRICT LAW., Aug./Sept. 1978, at 53-57 [hereinafter cited as D.C. Bar Proposals].

- E. *The Ethics Legislation of 1978 and 1979*
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V. PROPOSED APPROACH TO THE PROBLEM OF DECIDING WHEN PARTICIPATION BY A FORMER AGENCY EMPLOYEE IS INAPPROPRIATE
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I. INTRODUCTION

In a message to Congress early in his administration, President Carter asserted, "[a]ll too often officials have come into government for a short time and then left to accept a job in private industry, where one of their primary responsibilities is to handle contacts with the former employer."[1] He called for an end to this "misuse of influence acquired through public service."[2]

In its preadjournment rush, the ninety-fifth Congress granted the President's request for legislation by passing the Ethics in Government Act.[3] For the ordinary federal employee, the changes were relatively minor: the existing one-year ban on appearing before one's agency with respect to any matter within one's former "official responsibility" was extended to two years.[4]

However, the Act made significant changes regarding persons with "substantial decisionmaking authority," defined by the legislation as persons paid at level GS-17 or above.[5] Such an official who left government after July 1, 1979, would be guilty of a felony if—even in the privacy of his or her office—he or she aided, counseled, advised, consulted, or assisted in representing "any other person (except the United States)"[6] in connection with a matter that was within his or her "official responsibility" within one year before he or she left the agency.[7] Such an official would be barred from making any oral or written communication to the former agency on behalf of anyone other than the United States, even in matters arising after the official left office, including a later rulemaking proceeding.[8]

This legislation was conservative in comparison to some of the other proposals pending at the time of its passage. The Bar Association for the District of Columbia, for example, was considering proposed amendments to Disciplinary Rule 9-101 of its Code of Professional Responsibility that would have restricted the activities of lawyers licensed in the District of Columbia even more severely than the federal statute.[9] The Federal Trade Commission, in turn, had proposed to amend its own separate Rules of Procedure to forbid a former employee from participating in any proceeding in which his experience could give him an "unfair advantage."[10]

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[1] 13 Weekly Comp. of Pres. Doc. 647, 649 (May 3, 1977).

[2] *Id.*

[3] Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified in scattered sectons of 2, 5, 18, 26, 28 U.S.C.A. (West Supp. 1979)) (amended 1979).

[4] 18 U.S.C.A. § 207(b)(i) (West Supp. 1979) (amended 1979).

[5] *Id.* § 207(d). Actually, four types of persons were placed in this category: (1) persons paid a sum equal to or greater than the Federal Executive Salary Schedule, set forth in 5 U.S.C. §§ 5311-5317 (1976); (2) persons paid at or above the basic rate of GS-17, prescribed by 5 U.S.C. § 5332 (1976); (c) active duty commissioned officers paid at level 0-7 or above as prescribed in 37 U.S.C. § 201 (1976); and (4) persons with "substantial decisionmaking authority" as defined by the Director of the Office of Government Ethics, a position created by Title IV of the legislation. Pub. L. No. 95-521, §§ 401-406, 92 Stat. 1824 (1978) (codified at 5 U.S.C.A. app. §§ 401-405 (West Supp. 1979)).

[6] 18 U.S.C.A. § 207(b) (West Supp. 1979) (amended 1979).

[7] *Id.* § 207(b)(3).

[8] 18 U.S.C.A. § 207(c) (West Supp. 1979). President Carter had imposed these requirements on his own appointees at the outset of his administration by requiring a letter of agreement to these terms. 35 Cong. Q. 52-57 (1977).

Passage of the President's proposal should normally have preempted this other activity and resolved the issues, at least for the present. The new law, however, created problems of its own. In the eight months between passage of the legislation and its effective date, significant numbers of high-level administration officials suggested that they might resign in order to avoid the new strictures.[11] Almost immediately after its passage, efforts to amend the law began. The Office of Government Ethics drafted regulations narrowly construing new section 207,[12] and members of both houses introduced bills "to clarify" and limit the new law.[13] The President signed amendatory legislation in June 1979, less than two weeks before the provisions of the Ethics in Government Act were to have taken effect.[14]

Even with passage of these clarifying amendments, however, the question of the appropriate limits on activities of former government employees remains a problem of intense interest and practical concern to officials and agencies alike. On some crucially important issues—the attribution of a former government lawyer's disqualification to his or her current law partners, for example—the legislation is still totally silent, and conflicting court decisions render the state of the law on these questions uncertain.[15]

This Article will discuss the controversy in its historical context, organize specific issues for systematic analysis, evaluate the various criticisms of postemployment activity, and propose a simpler, more direct way of regulating the truly objectionable features of such activity.

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[9] One version of the proposed changes was published in DISTRICT LAW., Winter 1977, at 46. The version pending at the time the legislation was considered appeared in DISTRICT LAW., Aug./Sept. 1978, at 44. The final version submitted for approval to the District of Columbia Court of Appeals in February 1979 is reported in *Final Revolving Door Proposal Submitted to D.C. Court of Appeals*, DISTRICT LAW., Apr./May 1979, at 47-63. See notes 85-94 *supra* and accompanying text.

[10] 16 C.F.R. § 4.1(b) (1979). The proposed changes were published in 43 Fed. Reg. 35,947 (1978). However, their adoption has been deferred pending action of the District of Columbia Court of Appeals on the District of Columbia Bar proposal.

[11] *See A Federal Brain Drain*, NEWSWEEK, Mar. 5, 1979, at 51.

[12] 5 C.F.R. § 737 (1979).

[13] *See, e.g.*, H.R. 2119, 96th Cong., 1st Sess. (1979). See text accompanying note 122 *infra*.

[14] Pub. L. No. 96-28, 93 Stat. 76 (1979) (to be codified at 18 U.S.C. § 207(b), (d)(1)-(2)). This was an amended version of S. 869, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S4241 (daily ed. Apr. 9, 1979). See text accompanying notes 127-31 *infra*.

[15] *Compare, e.g.*, Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977) *with* Armstrong v. McAlpin, 606 F.2d 28 (2d Cir. 1979), *rehearing en banc granted*, No. 79-7042 (2d Cir. Dec. 12, 1979).

II. The Historical Development of Post-Government Employment Restrictions

A. *The Pre-1962 Legislation*.

In the midnineteenth century, government was a far smaller enterprise than it is today. Much of its business, particularly in the period following the Civil War, consisted of paying "claims" against the government. These claims were often based on evidence that was hard to verify and were frequently processed and paid somewhat informally within the agency, subject only to audit and approval by the Comptroller of the Treasury.[16] Fearful of collusion and fraud, Congress passed legislation designed to prevent *active* government officials from assisting private claimants in pressing their suits before government agencies,[17] and in 1872 Congress extended the prohibition to *former* employees.[18] A rider to the post office appropriations bill provided:

> [I]t shall not be lawful for any person . . . appointed an officer, clerk, or employee in any of the executive departments to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in said Departments while he was said officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee.[19]

This statute, codified as 5 U.S.C. § 99, remained unchanged for ninety years.

The language of this statute, however, created several problems. First, the statute related only to prosecuting claims,[20] an ambiguous and arguably narrow proscription. Second, many government employees were considered exempt from the law because the Attorney General had taken the position that section 99 covered only employees of executive departments, not those of independent agencies.[21] In addition, the Attorney General later issued an opinion stating that even Army contracting officers were not considered employees of a "department" of government.[22] Finally, the section did not provide for any penalty. Although prosecution of a claim was not lawful, the penalty often imposed by courts was simply denial of the former employee's fee for his claims collection service.[23]

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[16] *See, e.g.*, H. Mansfield, The Comptroller General 23-65 (1939).

[17] Act of June 11, 1864, ch. 119, 13 Stat. 123 (codified at 18 U.S.C. § 281 (1958)) (repealed 1962) (compensated assistance); An Act to Prevent Frauds Upon the Treasury of the United States, ch. 18, § 2, 10 Stat. 170 (1853) (codified at 18 U.S.C. § 283 (1958)) (repealed 1962) (uncompensated assistance). These laws forbade assistance by active officials regardless of whether they were compensated and regardless of whether the agency involved was the one for which they worked.

[18] Post Office Appropriations Act, ch. 256, § 5, 17 Stat. 202 (1872) (codified at 5 U.S.C. § 99 (1958)) (repealed 1962).

[19] *Id.*

[20] However, the terms had been construed to cover an appearance before Congress to obtain special legislation to pay an Indian upon whose land the United States had cut timber. Van Metre v. Nunn, 116 Minn. 444, 133 N.W. 1012 (1912).

These problems with section 99 led to the adoption of a second section on postemployment restrictions, section 284 of the Crimes and Criminal Procedure Act,[24] which was incorporated into the revision of the federal criminal code in 1948:

> Whoever, having been employed in an agency of the United States, including commissioned officers assigned to duty in such agency, within two years after the time when such employment or service has ceased, prosecutes or acts as counsel, attorney, or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duty, shall be fined not more than $10,000 or imprisoned not more than one year, or both.[25]

This section was an addition to, not a replacement for, the earlier statute. It substituted the term "agency" for the word "department," included military officers in its coverage, and imposed misdemeanor criminal penalties. At the same time, the coverage of the statute was significantly narrowed to prosecution of claims "involving any subject matter directly connected with which such person was so employed or performed duty . . . ."[26]

B. *Recognition of the Need for Reform.*

Attorneys are among those persons most affected by restrictions on employment after government service. Not surprisingly, then, the American Bar Association Canons of Professional Ethics took a position on proper behavior of the former government lawyer. Canon 36 provided: "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."[27] Further, and more generally, Canon 6 provided: "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."[28] The duty to preserve client confidences—presumably including government-client confidences—was established, in turn, by Canon 37.[29]

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[21] 25 Op. Att'y Gen. 6 (1903).

[22] 31 Op. Att'y Gen. 471 (1919). Congress attempted to reverse this position with the Army Appropriations Act, ch. 8, 41 Stat. 104 (1919) (current version at 18 U.S.C.A. §§ 203-205, 207 (1976 & West Supp. 1979).

[23] *See, e.g.*, Van Metre v. Nunn, 116 Minn. 444, 133 N.W. 1012 (1912).

[24] Ch. 139, § 284, 62 Stat. 698 (1948) (codified at 18 U.S.C. § 284 (1958)) (repealed 1962).

[25] *Id.*

[26] *Id.*

Two important cases in the 1950s helped catalyze the belief that the statutes and these Canons needed reexamination. In *United States v. Bergson*,[30] decided in 1954, the defendant had been the former head of the Antitrust Division of the Department of Justice. Within two years after leaving office, Bergson wrote a letter to the Department seeking clearance for a particular corporate merger. The matter was clearly of the type he had handled while in office. He was prosecuted under section 284 of the then recently enacted Crimes and Criminal Procedure Act.[31] The district court acquitted Bergson, however, on the ground that a request for premerger clearance was not a "claim against the United States" and thus did not violate the statute. The term "claim," said the court, "is limited to demands against the Government for money or for property."[32]

For those who disapproved of Bergson's conduct, the reach of the statute was obviously inadequate. Even for others, the statute created an anomaly. The narrow construction of "claim" meant that a former Internal Revenue Service agent could help a taxpayer resist claimed taxes, for example, but could not help him seek a refund of taxes paid.[33]

An even more celebrated case was decided the next year. In *United States v. Standard Oil Co.*,[34] the defendant had sold crude oil to European firms at prices allegedly in excess of the maximum permitted by the Economic Cooperation Administration. Counsel for the defendants included an attorney who had been employed in the Paris office of the Administration from 1949 to 1951. The government moved to have him disqualified pursuant to the Canons of Ethics, which had been adopted as rules of the court in the Southern District of New York. After a lengthy and specific factual analysis, the district court ruled that the former government attorney had not seen any of the documents relevant to the case, passed upon any of the issues in the case, or given legal advice in relation to any of the regulations involved. Thus, the court denied the motion to disqualify.[35]

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[27] ABA CANONS OF PROFESSIONAL ETHICS NO. 36 (1937).

[28] ABA CANONS OF PROFESSIONAL ETHICS NO. 6 (1908).

[29] ABA CANONS OF PROFESSIONAL ETHICS NO. 37 (1937). Canon 37 provided: "It is the duty of a lawyer to preserve his client's confidences. . . . A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

[30] 119 F. Supp. 459 (D.D.C. 1954).

[31] Ch. 139, § 284, 62 Stat. 698 (1948) (codified at 18 U.S.C. § 284 (1958)) (repealed 1962). See text accompanying note 25 *supra*.

[32] 119 F. Supp. at 465.

[33] An even earlier recognition of the problems in the statutes was in McElwain & Vorenberg, *The Federal Conflict of Interest Statutes*, 65 HARV. L. REV. 955 (1952).

[34] 136 F. Supp. 345 (S.D.N.Y. 1955).

Several issues in the case sufficiently troubled District Judge Irving R. Kaufman that he wrote an article in the *Harvard Law Review*[36] about the case and the ambiguities that he saw in the existing law. He raised such questions as whether the statute required that the knowledge of other attorneys in the government office be imputed to an attorney, even though he had not seen any of the documents; whether the attorney's former client was the entire government, his former agency, his Paris office, or some other entity entirely; and when the "appearance of evil" would be such that an attorney should be disqualified even if there has been no actual abuse of confidential information.[37]

Judge Kaufman was not complaining that the reach of the Canons and statutes was too narrow. In fact, he felt that the "revolving door" practice should be "encouraged rather than discouraged."[38] His concern was with the ambiguities faced by lawyers who were trying scrupulously to be ethical. Particularly troublesome was the problem created for "part-time" government employees such as consultants or members of boards and commissions. Did their public service disqualify them and their law firms from all cases involving the government? Judge Kaufman asserted that "many attorneys are turning down cases they should be free to take because of uncertainty as to the controlling ethical principles."[39] He called attention to "the urgency of the problem" and urged the bar to "take measures to alleviate it."[40]

Publication of Judge Kaufman's commentary led to two further studies. In 1957, Chairman Celler of the House Judiciary Committee ordered a study of all the federal conflict of interest laws, including sections 99 and 284,[41] and in 1958 the Association of the Bar of the City of New York created a ten-member committee with a professional staff headed by Professor Bayless Manning. The committee studied the problem for two years, and published its findings in a book that thoroughly analyzed the existing law and proposed draft legislation.[42] The present federal restrictions on postemployment activity, including their complexity and sophistication, can be traced in large part to this Association of the Bar Report.

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[35] *Id.* at 363-67.

[36] Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957).

[37] *Id.* 662-63.

[38] *Id.* 668. There is a basis for arguing that Judge Kaufman's views may now have changed somewhat. See notes 70-73 *infra* and accompanying text.

[39] Kaufman, *supra* note 36, at 668.

[40] *Id.* 669.

C. *The 1962 Legislation.*

When the Kennedy administration took office in 1961, it appointed a three-member advisory panel to recommend changes in the federal conflict of interest laws.[43] Within a few weeks, the panel presented proposals that were a simplified version of the Association of the Bar draft statute. Legislation was passed in the closing days of the eighty-seventh Congress.[44]

Section 207 of the new statute, the Bribery, Graft and Conflicts of Interest Act,[45] reached all government employees, but it created a new category—that of "special Government employee"—to provide exceptions appropriate for certain kinds of consultants and other part-time employees.[46] Former employees were not forbidden from dealing with all subject matters within their prior responsibility. The statute only prohibited subsequent activity with respect to defined "particular matters involving a specific party or parties."[47] Thus, for example, general policymaking activities of the employee, including participation in rulemaking activities, did not preclude his subsequent representation of a client in that area.

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[41] The resulting report was STAFF OF SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., REPORT ON FEDERAL CONFLICT OF INTEREST LEGISLATION (1958).

[42] The balanced approach of the report is seen in its opening paragraph:

> This book has two themes. The first is that ethical standards in the United States federal government must be beyond reproach. The second is that the federal government must be in a position to obtain the personnel and information it needs to meet the demands of the twentieth century. These themes are coequal. Neither may be safely subordinated to the other.

BAR REPORT 3.

[43] The members of the panel were Judge Calvert Magruder of the First Circuit, Dean Jefferson Fordham of the University of Pennsylvania Law School, and Professor Bayless Manning.

[44] Bribery, Graft and Conflicts of Interest Act, Pub. L. No. 87-849, 76 Stat. 1123 (1962) (codified at 18 U.S.C. §§ 201-218 (1976)) (amended 1977, 1978, 1979).

[45] 18 U.S.C. § 207 (1976) (amended 1978, 1979).

[46] The term, "special Government employee," is defined in section 202(a) to mean (in addition to several specially defined cases) any person "employed . . . , with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days . . . ." *Id.* § 202(a) (1976) (amended 1978).

[47] *Id.* § 207(a), (b) (1976) (amended 1978, 1979).

The legislation differed from the Bar Association's draft statute in several respects. The Association of the Bar proposal would have placed permanent limitations on the employee's activity in matters in which he had "participated" during his government employment.[48] The concept of "participation" was substantially qualified in the statute to read "participated *personally and substantially* . . . through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise . . . ."[49]

The Bar Association had also proposed a two-year ban on activities concerning "transactions" that had been under the employee's "official responsibility" while working for the government.[50] This was a direct reaction to the *Standard Oil* case.[51] The concept of "official responsibility" was defined in the proposal as "the direct administrative or operating authority . . . effectively to approve, disapprove, or otherwise direct Government action."[52] The statute adopted this concept but set the ban at only one year.[53] In addition, the statute was more specific than the Bar Association draft in describing prohibited subsequent activity. The phrase "assist another person" in the Association of the Bar proposal was changed in the statute to "act as agent or attorney for anyone."[54] Coupled with the requirement of a "particular matter," the prohibition applied only to persons acting in a representative capacity in a judicial or an administrative proceeding. The language did not prohibit office counseling. As recommended by the Association of the Bar, section 208 expressly prohibited a current federal employee from participating in any matter in which "any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest."[55] That disqualification was, however, subject to waiver by the "official responsible for [the employee's] appointment to his position . . . [upon a showing that the] interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from such officer or employee . . . ."[56]

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[48] Bar Report 292.

[49] 18 U.S.C. § 207(a) (1976) (amended 1978) (emphasis added).

[50] Bar Report 292.

[51] United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955). See text accompanying notes 34-35 *supra*.

[52] Bar Report 275.

[53] 18 U.S.C. § 207(b) (1976) (amended 1978, 1979). The term "official responsibility" is defined in section 202(b) in accord with the Bar's definition.

[54] *Id.* § 207(a), (b) (1976) (amended 1978, 1979). In addition, the 1962 law, for the first time, made it clear that activities consistent with the government's interest, not just those opposed to it, were prohibited. The law covered any matter "in which the United States is a party or has a direct and substantial interest." *Id.*

[55] *Id.* § 208(a) (1976) (amended 1977).

In a major departure from the Association of the Bar proposal, section 207 failed to require that partnerships in which the former official was involved be disqualified.[57] The House bill had provided for imputed disqualification, but the Senate rejected that provision. The point was controversial, and the legislative history shows that Congress rationalized that the only people to whom the issue was of practical concern were attorneys. Attorneys had their own standards of legal ethics governing disqualification of law firms, Congress reasoned, and the issue should be resolved by those standards.[58] The statute contained no provision for waiving the former employee's own disqualification,[59] and as a result of the silence on disqualification of partnerships, there was also no reference to waiver of imputed disqualification.

Finally, the statute upgraded the criminal sanctions to felony status, but failed to go further and adopt the Association of the Bar proposal to create civil and administrative penalties as well.[60]

D. *Developments Between 1962 and 1978.*

The "revolving door" between private life and government service was not a subject of significant attention in the years shortly after 1962. President Johnson, for example, issued an important Executive Order on Ethics in Government Services in 1965,[61] in which he did not even mention the subject. For many years, of course, critics of military spending had maintained that the practice of recruiting Department of Defense personnel from companies that are defense contractors led to the perceived need for large defense budgets.[62] These critics had also alleged that these companies might be receiving favored treatment from their former employees or from persons wanting positions with these firms upon leaving the government.[63] The only statutory response to these charges, however, was to require former high-level Defense Department and National Aeronautics and Space Administration officials to report any dealing they had with their former agencies during the first three years after their departure from the government.[64] The substantive requirements on such persons were the same as those that section 207 imposed on all other former officials.

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[56] *Id.* § 208(b).

[57] Indeed the last sentence of section 207 read: "A partner of a present or former officer or employee . . . shall as such be subject to . . . [Section 207] only as expressly provided in subsection (c) of this section." Subsection "c" did not deal with the *former* employee; it dealt only with partners of present employees.

The Bar's proposed statute would have created a two-year ban on the partnership's assistance in matters in which the former government employee "participated" during government employment; these were, it will be remembered, matters for which the employee himself would have been permanently disqualified. No limitation was to be placed on the law firm's involvement in matters within the "official responsibility" of the former government employee. BAR REPORT 292-93.

[58] *See* S. REP. No. 2213, 87th Cong., 2d Sess. 13 (1962). This view is confirmed by the interpretative memorandum of Attorney General Robert Kennedy, 28 Fed. Reg. 985, 988 (1963). *See also* Perkins, *The New Federal Conflict-of-Interest Laws*, 76 HARV. L. REV. 1113, 1159-62 (1963).

[59] The Bar had proposed a narrowly drawn waiver procedure. In matters involving federal contracts, application could be made to the head of the agency for which the former employee had worked to certify that the former employee has "special knowledge" or skills necessary to the performance of the contract. BAR REPORT 285-86.

[60] In addition to proposing enforcement by criminal penalties, the Bar Committee proposed a civil damage remedy and an administrative remedy that would bar the former employee from appearing before, or negotiating business with, the agency if a violation were proved. *Id.* 299-303. This "administrative remedy" reappeared in the 1978 amendments to section 207, and is now codified in 18 U.S.C.A. § 207(j) (West Supp. 1979).

Studies by Ralph Nader organizations in the late 1960s and early 1970s[65] apparently were the turning point in perceptions of the "revolving door" phenomenon. These reports helped popularize the view that regulation was going wrong, not because it had been misconceived in the first place but because the process had been "captured" by the regulated firms.[66] One way to explain the occurrence of this alleged capture was to point to the allegedly incestuous relationship between persons working for regulatory agencies and the firms for which they ultimately expected to work.

About the same time as the Nader studies, public-interest organizations—representing groups formerly thought to lack representation in governmental decisionmaking processes[67]—came to national promi-

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61. Exec. Order No. 11,222, 3 C.F.R. 386 (1969). Indeed, by Exec. Order No. 11,451, *reprinted in* 5 U.S.C. § 4103 note (1976), President Johnson established a Commission on Personnel Interchange designed to encourage employees of private firms to engage in temporary government service and government employees to work temporarily in private industry. *See id.*

62. *E.g.*, W. PROXMIRE, REPORT FROM WASTELAND: AMERICA'S MILITARY INDUSTRIAL COMPLEX (1970).

63. *Id.* 123-50.

64. 42 U.S.C. § 2462 (1976); 50 U.S.C. § 1436 (1976). Both restrictions were originally adopted in 1969 as part of the respective agency authorization bills, H.R. 11271, 91st Cong., 1st Sess. (1969), and S. 2546, 91st Cong., 1st Sess. (1969).

65. *E.g.*, THE CLOSED ENTERPRISE SYSTEM (M. Green ed. 1971); E. COX, R. FELLMETH & J. SCHULZ, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (1969); R. FELLMETH, THE INTERSTATE COMMERCE OMISSION (1970).

66. For many years, other economic historians have asserted that regulatory programs were never really imposed on unwilling industries. Instead, under this view, industries that had difficulty forming cartels sought nominal regulation that was, in fact, in their private interest. *E.g.*, G. KOLKO, THE TRIUMPH OF CONSERVATISM (1963). This perception, however, was not widely accepted until Nader gave it a populist flair.

67. *See, e.g.*, M. GREEN, THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS (rev. ed. 1978); B. WEISBROD, J. HANDLER, & N. KOMESAR, PUBLIC INTEREST LAW:

nence. These organizations claimed that one reason their views had not been considered was that they were excluded from the revolving door process. That is, if all the decisionmakers came from industry and expected to return there, their decisions could not be expected to reflect the general public interest.

For lawyers, one key development was the American Bar Association's adoption of a new Code of Professional Responsibility in 1969. Disciplinary Rule 9-101(B) of that Code provides: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."[68] The related Ethical Consideration, EC 9-3, explains that "to accept employment [under these circumstances] would give the appearance of impropriety even if none exists."[69]

No reported disciplinary cases were brought to enforce these provisions, but the provisions did provide a basis for the decision of the Second Circuit in *General Motors Corp. v. City of New York*.[70] In that case, New York City wished to file a class action suit alleging that Gen-

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AN ECONOMIC AND INSTITUTIONAL ANALYSIS (1978); Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976); Symposium, *The Practice of Law in the Public Interest*, 13 ARIZ. L. REV. 797 (1971); Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

[68] ABA CODE DR 9-101(B). The term "matter" in this Disciplinary Rule was apparently meant to pick up the distinction made in Allied Realty of St. Paul, Inc. v. Exchange Nat'l Bank, 283 F. Supp. 464 (D. Minn. 1968), *aff'd*, 408 F.2d 1099 (8th Cir.), *cert. denied*, 396 U.S. 823 (1969), decided the preceding year. In that case, a young assistant United States attorney had "second chaired" a criminal trial in which it was alleged that the defendant had fraudulently purported to place a mortgage on a piece of property to get a loan for a national bank. After leaving the United States attorney's office, the lawyer filed a civil fraud suit on behalf of the bank against the former criminal defendant. This later suit was not contrary to the interest of the government; indeed it furthered the deterrent and remedial policy of the criminal law. Yet a motion to disqualify the lawyer was granted. General knowledge about the operation of the government and even the policies applied in a particular office would not constitute the basis for disqualification, the court reasoned, but when the specific subject matter of the private suit was the same as that on which the lawyer worked as a public employee, disqualification had to be ordered. No confidences in the normal sense were compromised by this representation, but the identity of the subject matter was decisive.

Note that the ABA ban, like section 207(a), is permanent. However, the ABA Code applies to all public lawyers equally and does not establish separate rules for part-time employees, former military officers, and the like. Further, the intensity of the relationship to the case is defined as "substantial responsibility." Presumably that is something more than "official responsibility," but less than "personal and substantial" participation, although not even the footnotes to the Code indicate why this particular standard was chosen. Finally, while section 207 limits only certain kinds of government contacts, the ABA standard prohibits giving private counsel and acting as an attorney in all forums, presumably including Congress, as long as the "matter" is the same.

[69] ABA CODE EC 9-3. Under the ABA Code, a Disciplinary Rule is "mandatory" and a violation of it will subject the offender to professional discipline. An Ethical Consideration is "aspirational" and often provides a form of legislative history.

[70] 501 F.2d 639 (2d Cir. 1974).

eral Motors had monopolized or attempted to monopolize the national market for city buses. The City hired a private lawyer, George J. Reycraft, to represent it on a contingent fee basis. When first approached, Mr. Reycraft informed the city corporation counsel that he had worked in the Antitrust Division of the Department of Justice on an investigation of the same issue. Although he had not been "in active charge of the case,"[71] he had participated substantially in preparing a complaint against General Motors and had signed the Antitrust Division complaint in 1956. The Justice Department formally advised Mr. Reycraft that section 207 did not apply to his case because the government was neither involved in nor affected by the results of the private suit.

After Mr. Reycraft filed a complaint on behalf of the City in October 1972, the primary issue became the effect of Disciplinary Rule 9-101(B) on the propriety of Reycraft's representation. The district court ruled that the 1956 Antitrust Division case and the 1972 private suit were not the same "matter," but the Second Circuit disagreed. In an opinion by the same Judge Kaufman who had expressed his concern about the overbreadth of the Canons of Ethics in the *Harvard Law Review* nineteen years earlier,[72] the court reasoned that since the overt acts alleged in the private complaint had been lifted directly from the Justice Department complaint, the "appearance of impropriety" was present and that Mr. Reycraft must therefore be disqualified.[73]

In this period of growing hostility toward the revolving door phenomenon, the attitudes expressed by American Bar Association Formal Opinion No. 342[74] in 1975 provided a striking contrast. At the time of the adoption of the American Bar Association Code in 1969, its principle for imputing disqualification of one lawyer to his entire law firm was very narrow. Disciplinary Rule 5-105(D) then provided: "If a lawyer is required to decline employment or to withdraw from employment under *DR 5-105*, no partner or associate, of his firm may accept or continue such employment."[75] The key was the reference to Disciplinary Rule 5-105, which prohibited *simultaneously* representing two or more clients with differing interests, but which did not prohibit taking a case contrary to the interest of a *former client*.[76] In 1975, however, Disciplinary Rule 5-105(D) was amended by substituting the words "disciplinary rule" for "DR 5-105." The effect of this amendment is that whenever a lawyer is disqualified for *any* reason under the American Bar Association Code, every member of his or her law firm is also disqualified. This rule apparently extends, therefore, to disqualifications required of former government lawyers under Disciplinary Rule 9-101(B).

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[71] *Id.* at 642 (quoting affidavit of Mr. Reycraft).

[72] See notes 36-40 *supra* and accompanying text.

[73] The court cited ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 37 (1931) for the idea that the rule was to prevent the charge that an employee had acted in "the hope of being later employed privately to *uphold or upset* what he had done." 501 F.2d at 649 (emphasis in original). Citing his *Harvard Law Review* article, Judge Kaufman concluded that "what creates an appearance of evil . . . is largely a question of current ethical-legal mores." *Id.* (citing Kaufman, *supra* note 36, at 660).

[74] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 342 (1975), *reprinted in* 62 A.B.A.J. 517 (1976).

[75] ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1969).

The explanation of the extension, set forth in Formal Opinion No. 342 of the American Bar Association Committee on Professional Ethics, however, indicates that constraining the revolving door phenomenon was not what the Committee had in mind. After considering the ambiguity and intent of Disciplinary Rule 9-101(B), the Committee reasoned that an "inflexible application of DR 5-105(D) would actually thwart the policy considerations underlying DR 9-101(B)."[77] According to the Committee, the phrase "substantial responsibility" was used in Disciplinary Rule 9-101(B)

> to inhibit government recruitment as little as possible and enhance the opportunity for all litigants to obtain competent counsel of their own choosing, particularly in specialized areas. An inflexible extension of disqualification throughout an entire firm would thwart those purposes. So long as the individual lawyer is held to be disqualified and is screened from any direct or indirect participation in the matter, the problem of his switching sides is not present . . . .[78]

The opinion concluded that the purposes of Disciplinary Rule 9-101(B) can be accomplished by requiring disqualification only when the disqualified lawyer "has not been screened, to the satisfaction of the government agency concerned, from participation in the work and compensation of the firm on any matter over which as a public employee he had substantial responsibility."[79] Further, the Committee reasoned that since a private client can waive disqualification of a lawyer pursuant to Disciplinary Rule 5-105(C), it would be "unthinkable" not to permit the government to waive the disqualification of the opposing party's attorney whenever it is satisfied that the "screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interest of the government . . . ."[80]

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[76] The prohibition against taking a case contrary to the interest of a former client is derived by inference from Canon 4, which requires preservation of the confidences and secrets of a client.

[77] ABA Opinions, No. 342, *supra* note 74, at 10, *reprinted in* 62 A.B.A.J. 517, 520 (1976).

[78] *Id.* 11, 62 A.B.A.J. 521.

[79] *Id.*

At the time of this opinion, however, the nation had just come through the events of Watergate. Concern about ethics and public morality was high, and the American Bar Association's concern about preserving the interchange of persons between public and private life was not universal. Indeed, Common Cause conducted a widely publicized study in 1976,[81] and found that "numerous public employees leave government to go to work for private interests with which they had direct dealings."[82] It expressed concern about government employees' "bias toward companies or industries in which future employment is anticipated" and the ability of former officials to have "special access and influence" in their agencies.[83] Under the Common Cause proposal, agency officials at level GS-15 or above would have been required to sign a contract promising that for two years after leaving the government, they would not accept employment with any company that was party to a "specific agency or proceeding" or "affected by a policy proceeding" in which the employee participated, and promising never to represent any company before the former agency.[84]

Meanwhile, the Ethics Committee of the District of Columbia Bar had before it Inquiry 19, a request for guidance from two partners, *A* & *B*, who had been retained to negotiate a "follow-on" contract between a client and the lawyers' former agency. *B* had been involved in discussions about the the original contract while still at the agency; *A* had been administrative head of the agency. The Ethics Committee issued a draft opinion that *B* was disqualified because of his personal participation in the original contracting process and that his disqualification had to be imputed to *A*.[85] However, the storm of protests over this draft caused the Ethics Committee to refer the matter to a subcommittee to propose possible revisions to the District of Columbia version of Disciplinary Rule 9-101 itself. The subcommittee's controversial report[86] proposed tight restrictions on the postgovernment practice of lawyers.

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[80] *Id.* 12. The Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York reached the same conclusions in its Opinion No. 889, *reprinted in* 31 REC. 552, 566 (1976). The philosophy of both opinions was adopted by the Court of Claims in Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977), but rejected in Armstrong v. McAlpin, 606 F.2d 28 (2d Cir. 1979), *rehearing en banc granted*, No. 79-7042 (2d Cir. Dec. 12, 1979).

[81] COMMON CAUSE STUDY.

[82] *Id. i.*

[83] *Id.* iii.

[84] *Id.* 64, 71-72.

[85] The exposure draft was published in DISTRICT LAW., Fall 1976, at 39.

[86] The text of the original proposal is reported in DISTRICT LAW., Winter 1977, at 46. A debate on the then new proposal between Lloyd Cutler and Monroe Freedman may be found in 63 A.B.A.J. 724 (1977).

First, the proposed District of Columbia Bar rules would have prohibited a lawyer from counseling or representing a client on any subject, if that *client* was involved in any matter in which the lawyer participated personally and substantially within one year prior to leaving the government. Thus, if a Securities and Exchange Commission lawyer had dealt with a company on a securities matter while in government, he or she would be barred from assisting that company in any way, even, for example, on tax questions. An alternative proposal would have prohibited a lawyer from being hired by any law *firm* that had represented any client in a matter in which the attorney had participated personally and substantially within one year prior to his or her leaving government.[87]

Second, the District of Columbia Bar proposals would have prohibited a lawyer for one year after leaving government from counseling or representing a client

> with respect to the validity, interpretation, scope, application or proposed modification or recission of any provision of a rule or regulation of general applicability, if the lawyer previously participated personally and substantially as a public officer or employee, within one year before leaving public office or employment, in the drafting of or decision to propose or adopt such proposed or effective provision.[88]

Thus, for one year the lawyer most knowledgeable about the meaning of an agency rule, for example, would be forbidden from providing anyone with the benefit of his or her expertise.

Third, unlike the federal statute, the District of Columbia Bar proposal dealt directly with the question of imputed disqualification. It provided that if one lawyer of the firm was disqualified, then all were disqualified, unless a detailed procedure for waiver was followed.[89] Waiver could be obtained, but only from the "lawyer or other official who [had] principal operational responsibility for the matter for the public agency or department upon determination by that official that the waiver [was] not inconsistent with the public interest."[90] In order to get such a waiver, the lawyer's firm, at minimum, would have had to provide an affidavit that the lawyer would not "participate in the matter in any way, directly or indirectly, . . . [and would not] share, directly or indirectly, in any fees of the matter."[91] Further, each of the firm's private lawyers working on the matter would be required to provide his or her own affidavit attesting that "he or she [would] not communicate about the matter directly or indirectly with the disqualified lawyer, and . . . that the client or clients [had] been so informed."[92] The waiver would have to be in writing and state "clearly the basis for the decision,"[93] after which the waiver would immediately be made public. The original version of the proposal even required that the decision of the official to grant the waiver be reviewed in turn by a judge or other "independent official."[94]

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[87] D.C. Bar Proposals 53-54 (proposed new DR 9-101(D)). *See* Memorandum from William H. Allen, Chairman, Legal Ethics Committee, to the Board of Governors of the D.C. Bar (July 3, 1978), *reported in* DISTRICT LAW., Aug./Sept. 1978, at 44-53.

[88] D.C. Bar Proposals 54 (proposed DR 9-101(E)).

[89] *Id.* 54-55 (proposed DR 9-102(B)).

[90] *Id.* 55 (proposed DR 9-102(B)(1)(a)).

E. *The Ethics Legislation of 1978 and 1979.*

President Carter reached office in the wake of—and partly as a result of—public concern about personal morality in government. It is not surprising, therefore, that the ninety-fifth Congress' H.R. 1[95] was an "ethics" bill. The groundwork for such legislation had been laid earlier. In the ninety-fourth Congress, Senator Ribicoff and the Government Operations Committee had conducted an extensive study of the process of government regulation.[96] The first volume of that study considered appointments to the regulatory agencies and contained an extended, careful examination of existing conflict-of-interest legislation.[97] The major focus of H.R. 1 and its earlier drafts, however, was financial disclosure.[98] Such disclosure was one of the chief concerns coming out of the Watergate scandal, although the relationship between the two is unclear. The proposals required extensive financial disclosure by members of Congress and federal judges, as well as executive branch officials and certain employees of independent agencies. Although most of the bills contained provisions to amend section 207, these provisions received relatively little attention from congressmen and senators or even from most congressional staffs. The Senate bill, S. 555,[99] passed the Senate by a wide margin in June 1977,[100] and what real debate arose over the legislation occurred in the House and later in the conference committee.

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[91] *Id.* (proposed DR 9-102(B)(1)(b)(1)).

[92] *Id.* (proposed DR 9-102(B)(1)(b)(2)).

[93] *Id.* (proposed DR 9-102(B)(1)(a)).

[94] *Id.* 55, 57 n.4. The final proposals submitted for approval of the District of Columbia Court of Appeals are reported in DISTRICT LAW., Apr./May 1979, at 47.

[95] H.R. 1, 95th Cong., 1st Sess. (1977), *reprinted in Hearings on H.R. 1, H.R. 9, H.R. 6954 and Companion Bills, Financial Disclosure Act, Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 3 (1977).

[96] S. DOC. NO. 25.

[97] *Id.* 39-91.

[98] In the Senate, the key bill was Senator Ribicoff's Public Officials Integrity Act, S. 555, 95th Cong., 1st Sess. (1977). That bill provided for financial disclosure, but it had additional provisions. One title established a congressional legal counsel to represent Congress in court; another established the machinery for appointing a special prosecutor to deal with executive branch misbehavior. Still another provision established an Office of Government Ethics to monitor and regulate the behavior of government officials.

Major opposition to the proposed changes came primarily from two sources. First, the House Armed Services Committee echoed the concern of the Defense Department that stringent restrictions on the postemployment activities of government personnel would inhibit persons from providing valuable advice to the Department. The committee expressed particular concern about "special government employees" such as consultants and other experts. It posed the example of a nuclear scientist who might consult with the Defense Department on complex technical questions and who also does extensive consulting for (or even is employed by) a defense contractor. Committee members argued that such persons are often unique national resources and that free access to their advice, undiscouraged by limitations on their later employability, is essential.[101]

Second, the Securities and Exchange Commission took great interest in the legislation, fearing its effect on recruiting. The Securities and Exchange Commission pointed out that many young lawyers come to work for the Commission expressly to gain experience in the securities business. After leaving, if these lawyers are to practice securities law at all, they must practice before the Commission. The Commission is not the only agency with this problem, of course, but it was by far the most vocal agency with respect to the bill.[102]

Despite this opposition, H.R. 1[103] passed the House shortly before adjournment.[104] After a short but compromising conference, an amended version of S. 555[105] passed both houses by a large margin.[106] As one individual recalled, "The President wanted it. There was no political benefit to be had in opposing this kind of legislation. Even if members did not believe it was particularly necessary or positive, they did not believe it was sufficiently pernicious that a politically risky vote was called for."[107]

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[99] 95 Cong., 1st Sess. (1977).

[100] The vote was 74 to 5. 123 CONG. REC. S10,774 (daily ed. June 27, 1977). For the basic legislative history, see [1978] U.S. CODE CONG. & AD. NEWS 4216-4397.

[101] HOUSE COMM. ON ARMED SERVICES, ETHICS IN GOVERNMENT ACT OF 1977, H.R. REP. No. 642, 95th Cong., 1st Sess. 15-18 (1977) (pt. II).

[102] *E.g.*, Letter from Chairman Harold M. Williams of the SEC to Chairman Peter W. Rodino of the House Judiciary Committee (Sept. 8, 1977), *reprinted in House Hearings*, *supra* note 95, at 598. The SEC has also been a vigorous opponent of the proposed District of Columbia Bar rules.

[103] H.R. 1, *supra* note 95.

[104] 124 CONG. REC. H10,862 (daily ed. Sept. 27, 1978).

[105] S. 555, 95th Cong., 1st Sess. (1977).

[106] Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified in scattered sections of 2, 5, 18, 26, 28 U.S.C.A. (West Supp. 1979)) (amended 1979). The bill passed the Senate by voice vote on October 7, 1978, 124 CONG. REC. S17,497 (daily ed. Oct. 7, 1978), and the House by a vote of 370 to 23 on October 12, 1978, *id.* H12,591 (daily ed. Oct. 12, 1978).

The compromises achieved in the conference committee highlight the major changes that the legislation made and what Congress saw as the most pressing policy concerns.[108] First, both bills had purported to extend the prohibition of postgovernment activity to "aiding and assisting" clients as well as directly representing them before an agency. Both houses considered it inappropriate that an individual could do something indirectly through an agent or partner that he or she could not do directly. The Senate bill would have prohibited "aiding and assisting" under section 207(a), and thus would have permanently banned such activity when it related to matters in which the employee had "personally and substantially" participated.[109] That prohibition would have been consistent, of course, with the traditional rule of legal ethics.[110] The House bill, on the other hand, would have categorized the "aiding and assisting" prohibition with the broader, but shorter (two-year) prohibition on activities within the former employee's "official responsibility." The compromise bill was narrower than either proposal. The prohibition on "aiding and assisting" applied to the two-year, official responsibility cases, but only with respect to employees at level GS-17 or above and the comparable military ranks.[111]

Second, Congress directed most of its attention to new section 207(c), which prohibits *any* official contact between the former employee and his or her agency for a period of one year. Both houses saw this one-year ban as a very important "cooling-off period," but recognized that it would discourage many people from working for the agencies, including the young Securities and Exchange Commission attorneys discussed above.[112] Because both houses viewed the prohibition as an attempt to limit former employees' ability to influence action simply through strength of personality and reputation, they were willing to restrict its coverage to high-ranking employees. The House bill would have applied to the more narrow category of persons with a rank of GS-16 and above whose positions are "excepted from the competitive service by reason of being of a confidential or policy making character."[113] The compromise bill kept the broader Senate coverage but limited the number of individuals affected by raising the grade level from GS-16 to GS-17. However, the Senate did accede to the House demand for a provision allowing the Director of the Office of Government Ethics to expand the coverage of this prohibition to include any other officer or employee "who has the role in the formulation of agency policy that is substantially similar to that exercised"[114] by the positions expressly covered.

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[107] Personal interview with the author. In this Article, general observations made by persons interviewed are not attributed to the individuals by name.

[108] S. Doc. No. 127 at 73-77.

[109] *See id.* 74.

[110] See notes 68-69 *supra* and accompanying text.

[111] *See* S. Doc. No. 127 at 74.

[112] See text accompanying note 102 *supra*.

Third, exceptions to the bill's coverage were a major issue. Congressman Eckhardt, for example, wanted to except all "licensed professionals"—which presumably would have included lawyers—leaving them subject only to the ethical requirements of their state licensing authorities. The Senate bill proposed to exclude communications that furnished scientific or technical information to the government, and the House bill proposed to permit a former employee to make uncompensated appearances on behalf of himself. The Eckhardt amendment on "licensed professionals" was rejected in conference, but the other two provisions were accepted.[115]

Fourth, the Senate bill created an "administrative remedy" for violations of section 207 that the House bill had not contained. At first blush, it seems somewhat strange to provide a noncriminal remedy in a criminal statute. However, the Senate committee believed that prosecutions were so few under the "knowing" requirement in the criminal statute that a more readily imposed remedy was desirable.[116] The House accepted this provision.[117]

F. *The Events of 1979.*

Ordinarily, the passage of a major piece of legislation ends discussion, at least temporarily, on the subject on which it was passed. In the case of the revolving door phenomenon, however, legislation marked only the beginning of the debate. Most notably, several high-level officials in the Department of Health, Education, and Welfare threatened to resign before July 1, 1979, the effective date of the statute, in order to avoid its provisions. Similar threats emanated from other agencies.[118]

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[113] S. Doc. No. 127 at 75.

[114] *Id.*

[115] The new provisions are codified in 18 U.S.C.A. § 207(f), (i) (West Supp. 1979).

[116] Senate Comm. on Governmental Affairs, Report to Accompany S. 555, The Public Officials Integrity Act of 1977, H.R. Rep. No. 170, 95th Cong., 1st Sess. (1977).

[117] *See* S. Doc. No. 127 at 77.

The agencies were required to establish procedures for implementing this procedural remedy within six months of the effective date of the statute, *i.e.*, by Jan. 1, 1980. 18 U.S.C.A. § 207(j) (West Supp. 1979).

Title IV of the new law[119] created the Office of Government Ethics as a new part of the Office of Personnel Management and charged it with drafting regulations to implement the legislation. On February 16, 1979, less than four months after passage of the statute, the chairmen and ranking minority members of both the House and Senate committees responsible for the law wrote a letter to the new Director of the Office of Government Ethics.[120] In that letter, they referred to a "misunderstanding" regarding the meaning of amended section 207(b)(ii). In spite of that section's use of the term "official responsibility" to describe the scope of the barred activities, they asserted in the letter that "[b]oth the transcript and the report of the House-Senate conference demonstrate that this provision applies only to those matters in which a former high-ranking official had been personally and substantially involved."[121] They expressed their hope that the Director would find this construction of the statute "helpful" in issuing his regulations.

In addition, more legislation was proposed to deal with the issues. Congressman Moorehead offered a bill to delete not only the "aiding and assisting" language, but also all the other changes directed at high-ranking employees.[122] Congressman Danielson proposed instead to delay the effective date of the legislation until January 1, 1980, in order to consider more permanent revisions.[123] On April 3, 1979, the Office of Government Ethics published a detailed set of regulations narrowly construing the "aiding and assisting" provision.[124] According to these regulations, only "representational" assistance would be prohibited, not assistance in an "oral or written communication made with an intent to influence."[125] Similarly, the regulations permitted assistance in managing contracts and grants.[126] Less than a week later, the Senate passed "clarifying" legislation proposed by the administration to confirm the new understanding of the "aiding and assisting" provision.[127] Instead of assistance "concerning" an appearance before an agency, the amendment prohibited only assistance "by personal presence at" the appearance. It also made clear that the prohibitions extended to both "official responsibility" and "personal and substantial participation" cases. Finally, the amendment excluded military officers in grades 0-7 and 0-8, brigadier and major general, from automatic coverage.

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[118] *E.g.*, *Congress Ponders Delaying or Softening New Job Limits Amid Talk of Mass Exodus*, 37 Cong. Q. Weekly Rep. 512-13 (Mar. 24, 1979); Newsweek, *supra* note 11, at 51. The three HEW officials were former college administrators who feared that if they could not "aid and assist" members of their academic departments in handling government grants, they would have little to do.

[119] Pub. L. No. 95-521, §§ 401-406, 92 Stat. 1824 (1978) (codified at 5 U.S.C.A. app. §§ 401-405 (West Supp. 1979)).

[120] Letter from Hon. Abe Ribicoff, Charles N. Percy, George E. Danielson, and Carlos J. Moorehead to Bernhardt K. Wruble, Director, Office of Government Ethics (Feb. 16, 1979), *reprinted in* 125 Cong. Rec. S1613 (daily ed. Feb. 21, 1979).

[121] *Id.* While the legislators were undoubtedly sincere, there is no support in the statute and little support in the legislative record for their construction of the law. All that they could cite for their understanding was the unpublished transcript of the conference deliberations in which Senator Ribicoff had stated his understanding of the legislative intent. *Id.*

[122] H.R. 2119, 96th Cong., 1st Sess. (1979).

[123] H.R. 2843, 96th Cong., 1st Sess. (1979).

[124] Amendments to 5 C.F.R. §§ 737.1 to .29 (1979), 44 Fed. Reg. 19,974 (1979).

[125] *Id.* 19,982. Construed more broadly, the statutory language would seem to cover even a

Members of the House made an unsuccessful effort to delete all of subsection (c) of the original legislation that created the one-year ban on all advocacy contact with the former agency.[128] A proposed six-month extension of the law's effective date was also defeated in committee.[129] However, the House did pass an amendment lifting the one-year ban for former officials working for colleges, universities, and similar nonprofit agencies and retaining the exclusion of one- and two-star generals from automatic coverage.[130] After further consultation between committees, both the House and the Senate passed a compromise bill incorporating the major proposals of each bill only two weeks before the July 1 effective date of the original law.[131]

Even after these legislative "solutions," however, questions concerning the Act's application did not abate. In September 1979, the Second Circuit handed down its decision in *Armstrong v. McAlpin*.[132] In March 1976, Michael Armstrong, receiver for Capital Growth Company, S.A. (Costa Rica), asked a New York firm to represent him in a suit against Clovis McAlpin, who allegedly had committed a securities

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public speech by a former official that unintentionally helped (aided) a nonclient firm deal with the government.

[126] *Id.* This issue had been of particular concern to the former academic administrators at the Department of Health, Education, and Welfare. See note 118 *supra* and accompanying text.

[127] S. 869, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S4241 (daily ed. Apr. 9, 1979).

[128] H.R. REP. NO. 115, 96th Cong., 1st Sess. 17, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 1418, 1430.

[129] *Id.*

[130] H.R. Res. 281, 96th Cong., 1st Sess., 125 CONG. REC. H3696 (daily ed. May 24, 1979). This exclusion was a direct response to the concerns of Department of Health, Education, and Welfare officials. See note 118 *supra* and accompanying text. *See Judiciary Panel Approves Weakened Job Restrictions*, 37 CONG. Q. WEEKLY REP. 788 (Apr. 28, 1979).

[131] Amendments to the Ethics in Government Act of 1978, Pub. L. No. 96-28, 93 Stat. 76 (1979) (to be codified at 18 U.S.C. § 207(b), (d)(1)-(2)).

[132] 606 F.2d 28 (2d Cir. 1979), *hearing en banc granted*, No. 79-7042 (2d Cir. Dec. 12, 1979). Former government lawyers were disqualified in at least two other cases during 1979. Both cases involved former prosecutors who sought to become defense counsel in cases on which they had worked as prosecutors. United States v. Ostrer, 597 F.2d 337 (2d Cir. 1979), and United States v. Kitchin, 592 F.2d 900 (5th Cir. 1979) (per curiam), *cert. denied*, 100 S. Ct. 86 (1979).

fraud that cost Capital Growth Company over $24 million. The law firm had recently hired an associate named Theodore Altman, who had spent the previous eight years at the Securities and Exchange Commission and had been personally involved in a Commission proceeding against McAlpin concerning the same alleged fraud.

The firm recognized the possible ethical issues raised by Altman's presence, but concluded that the screening procedures called for in American Bar Association Formal Opinion No. 342[133] would eliminate the problem. Moreover, the firm consulted the Securities and Exchange Commission and determined that the Commission had no objection to the firm's participation in the matter as long as Altman was not involved. McAlpin, however, moved to disqualify the firm because of Altman's work while at the Securities and Exchange Commission. The district judge denied the motion.[134]

On review, the Second Circuit acknowledged American Bar Association Formal Opinion No. 342[135] and Opinion No. 889 of the Association of the Bar of the City of New York,[136] and recognized that the Board of Governors of the District of Columbia Bar had endorsed screening as an adequate means of protecting the government and the public. It nonetheless reversed the district court.[137] While noting that "it would be entirely inappropriate to attempt to formulate a rule of general application respecting the law firm of a lawyer disqualified under DR 9-101(B) . . . ,"[138] the court found two inquiries relevant in each case. First, it questioned whether "the 'matter' for which the disqualified lawyer had 'substantial responsibility' [was] the kind of matter where the risks against which DR 9-101(B) guards are present."[139] Second, the court asked if "the 'substantial responsibility' that disqualifies the former government lawyer [resulted] from his active, personal participation in the matter or only from the nominal relationship of a supervisory official, such as an agency general counsel."[140]

In the view of the Second Circuit panel,

> [a] government attorney with direct, personal involvement in a matter involving enforcement of laws that are the basis for private causes of action must understand, and it must appear to the public, that there will be no possibility of financial reward if he succumbs to the

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[133] ABA Opinions No. 342, *supra* note 74. See notes 74-80 *supra* and accompanying text.

[134] Armstrong v. McAlpin, 461 F. Supp. 622 (S.D.N.Y. 1978), *rev'd*, 606 F.2d 28 (2d Cir. 1979), *rehearing en banc granted*, No. 78-7442 (2d Cir. Dec. 12, 1979).

[135] See notes 74-80 *supra* and accompanying text.

[136] See note 80 *supra*.

[137] 606 F.2d at 28.

[138] *Id.* at 33.

[139] *Id.*

[140] *Id.*

> temptation to shape the government action in the hope of enhancing private employment.[141]

Screening, according to the court, cannot assure that an attorney is not compensated, either now or later, for attracting the business from which he is apparently screened. An "internal arrangement insulating fees from the disqualifying case . . . would most likely be unknown to casual observers and unpersuasive to the more informed."[142] The court acknowledged that there was no suggestion in this case that any improper considerations had actually motivated Altman; however, disqualification was "required as a prophylactic measure to guard against misuse of authority by government lawyers."[143] Since the Court of Claims had reached a result directly contrary to this decision only two years earlier,[144] the law on this extremely sensitive question was left uncertain.

III. Problems in Establishing the Appropriate Limits on Private Activities After Government Service

The preceding historical record suggests that the concern about the private activities of former government officials has existed for well over a century. The cries of alarm and hints of scandal, however, have emerged during the last decade. After all the discussions and congressional debates, one would think that the subject had been clearly analyzed. However, several difficulties have precluded complete analysis: there seems to be no good information on the extent of the revolving door phenomenon, no clear breakdown of the questions comprising the revolving door issue, and no real consensus on the problems that the phenomenon creates.

A. *Difficulty Determining the Nature and Extent of the Revolving Door Phenomenon.*

One of the most difficult problems in assessing the significance of the revolving door phenomenon is the lack of empirical data. The General Accounting Office tried to study the issue in 1978, but concluded that no reliable information was available,[145] although it did report that "most agency officials contacted considered such problems at their agencies to be insignificant."[146] The report criticized the lack of data, but recognized that the present law does not require—or even permit—an agency to ask departing employees what their next jobs will be.[147] Several agencies have regulations requiring some disclosure by some officials,[148] but the General Accounting Office found that even those regulations are largely unenforced.[149]

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[141] *Id.* at 34.

[142] *Id.*

[143] *Id.* (footnote omitted).

[144] Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977).

[145] GAO Report 6-7.

[146] *Id.* 6.

The best data available on this question pertains to the activities of former agency commissioners. In 1976, Common Cause studied nine agencies and assembled statistics on the number of commissioners who had come originally from industry and the number of commissioners who had left the government to take jobs in industry.[150] According to the report, forty-eight percent of the resigning commissioners joined either a regulated company or a law firm serving regulated clients.[151]

Using similar data, the Senate Government Operations Committee found that results varied considerably from one agency to another.[152] Eleven of the fifteen Securities and Exchange commissioners leaving office between 1961 and 1976 either conducted business or joined a firm that conducted business subject to Securities and Exchange Commission supervision.[153] Eleven of the forty-eight Federal Communications and Federal Trade Commission commissioners studied had come from

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[147] *Id.* 11-13.

[148] *E.g.*, 16 C.F.R. § 4.1(b) (1979) (FTC); 17 C.F.R. § 200.735-2 (1979) (SEC).

[149] GAO Report 14-16.

[150] INTERCHANGE OF PERSONNEL
(For years 1971-1975)

COMMISSIONERS

Agency	Total number appointed	Number from industry	Total number that left agency	Number who took industry jobs
FTC	6	5	5	5
FPC	5	2	6	0
ICC	7	3	7	0*
SEC	7	5	7	5
FCC	7	5	7	4
CPSC	5	2	0	0
FDA	1	0	1	1
EPA	2	0	1	1
NHTSA	2	0	1	1
TOTALS	42	22	35	17

*ICC reported not knowing where two of the seven presently worked.

Common Cause Study 41.

[151] *Id.* 40.

[152] S. Doc. No. 25 at 65-68.

[153] *Id.* 67.

regulated industries, and twenty-four of the forty-eight were subsequently employed by these industries.[154] At the Federal Maritime Commission, on the other hand, "few . . . members came from the regulated industry and few go there afterward."[155] Further, the committee found, whatever the formal affiliations of any of the former commissioners, "personal appearances by former regulators before the same agency [were] rather unusual."[156] The Senate committee also scrutinized the circumstances behind the statistics. For example, it cited a New York Times article on the law practice of William Ruckleshaus, former head of the Environmental Protection Agency, as one example of the problem in evaluating the revolving door phenomenon.[157] According to the Times, nine lawyers in Ruckleshaus' law firm made at least 178 contacts over eighteen months with the Environmental Protection Agency.[158] Analyzing this data, the committee concluded:

> The firm's clients did include powerful trade associations . . . but the lion's share of the contacts appear routine: requests for public lists or reports; information on hearing dates; application for government funding for research and development. . . . It was ample evidence of an active law practice, but what else did it establish?[159]

The Senate committee also refuted press accounts suggesting improprieties in Manuel Cohen and Miles Kirkpatrick's postagency private practices. Cohen was a career Securities and Exchange Commission official who left when a change of administration forced him to relinquish the Commission chairmanship. Kirkpatrick was a prominent private lawyer who was coaxed into the Federal Trade Commission chairmanship after distinguished service at the head of an American Bar Association committee on the problems of that agency. The Senate committee concluded that the "Cohen and Kirkpatrick illustrations are by no means isolated examples. The private practice of law even in a regulatory specialty is not, ipso facto, an unconscionable culmination to years of public service."[160]

None of this data, however, related to the probably more important issue of what is happening below the top-level, highly visible agency positions. In trying to answer that question, Common Cause and the Senate committee met with problems similar to those within the General Accounting Office's experience.[161] The Food and Drug Administration told the Senate committee, for example, that of the ninety-nine officials at levels GS-15 or above "who left the agency between 1971 and 1975, only nine either took jobs with regulated firms or served as consultants to those interests."[162] However, Common Cause discovered that such data did not include any Food and Drug Administration lawyers, many of whom had gone to work for law firms with regulated clients.[163]

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[154] *Id.* 66 n.113. The committee was relying on J. GRAHAM & V. KRAMER, APPOINTMENTS TO THE REGULATORY AGENCIES: FCC AND FTC (1949-1974) (1976).

[155] S. DOC. NO. 25 at 66.

[156] *Id.*

[157] N.Y. Times, Aug. 23, 1976, at 40, col. 1, *cited in* S. DOC. NO. 25 at 65.

[158] N.Y. Times, Aug. 23, 1976, at 40, col. 1.

[159] S. DOC. NO. 25 at 65.

[160] *Id.* 64.

The inherent lack of data has remained a problem in the preparation of this Article. Only two new, tangential pieces of information can be added. First, in an analysis done for this Article,[164] the Securities and Exchange Commission determined that between January 1, 1974, and December 31, 1978, 604 employees left the agency who were or will be required to file "Section 6(b) reports"[165] if they appear in a proceeding before the agency within two years from the date of their departures. The number of persons filing such reports thus far has been 182, about thirty percent of the total.[166] Assuming everyone has complied with the law, approximately seventy percent of the Securities and Exchange Commission employees have *not* appeared before the agency within two years since their departures.

Second, in 1976 the Federal Trade Commission employed a management consulting firm to study turnover at the agency.[167] That study indicated that the agency loses, on average, about one-sixth of its attorneys each year, a proportion almost equal to the attrition rate at the Antitrust Division of the Department of Justice and the Securities and Exchange Commission, but much higher than that of most private law firms. A further breakdown of the figures indicates that, of the 120 attorneys who left the Federal Trade Commission during the eighteen-month study period, thirty-one percent had been employed there less than two years, another thirty-one percent were in their third year, and thirty percent were in their fourth year. Thus, approximately two-thirds of the departing attorneys had less than three years experience, and ninety percent had less than four years experience at the Federal Trade Commission. Two-thirds of these departing attorneys were found to have gone into private practice, and, perhaps significantly, forty percent of them reportedly were recruited by counsel for respondents in Federal Trade Commission proceedings.[168]

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[161] See text accompanying note 145 *supra*.

[162] S. Doc. No. 25 at 66 n.114.

[163] Common Cause Study 48, 60-62. Technically, FDA lawyers are paid by the Department of Health, Education, and Welfare.

[164] The study was done by Mr. William E. Ford, Assistant Director, Office of Personnel, Securities and Exchange Commission. His help is gratefully acknowledged.

[165] Letter from William E. Ford to Thomas D. Morgan (Feb. 26, 1979). This filing requirement, set forth in 17 C.F.R. § 200.735-8(b) (1979), states that a former SEC commissioner or employee must, for two years after leaving the SEC, file a statement with the Secretary of the Commission explaining the nature of any appearance he or she contemplates making before the Commission. The requirement is numbered "6(b)" in the Commission's Code of Conduct Regulations.

[166] Letter from William E. Ford to Thomas D. Morgan (Jan. 29, 1979).

[167] Meredith Associates, Inc., Study of Turnover at the FTC (on file at the FTC).

Of course, even if sufficient information were available, there would still be disagreement about its correct interpretation. A major problem might exist if a large number of former employees were to appear before their respective agencies, and the problem would be expensive to eliminate. However, without such data there is no way to analyze the costs and benefits of present or proposed rules in other than general terms.

The preparation of this Article has necessarily required reliance on interviews and the published writings of present and former government officials, as well as of critics and defenders of the "revolving door" phenomenon. Ultimately, however, one must candidly recognize that anyone's conclusions on this issue are unlikely to be based on concrete data.

B. *Issues To Be Addressed in Formulating Restrictions on Post-Employment Activity.*

To organize the revolving door phenomenon for analysis, one must break it down into several specific issues. There are at least fifteen issues that can be grouped under three general headings: the role of the employee while in government, the private role of the former employee, and the more general issues of enforcement and policy.

1. *The Role of the Employee While in Government.* Should the law distinguish between the several types of jobs in which a governmental official might be employed? For example, should lawyers be treated differently from persons administering federal contracts? Should either or both be distinguished from technical personnel such as scientists or test pilots? The Ethics in Government Act makes special

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[168] *Id.* 9-17. The Common Cause study also contains several other attempts to estimate the extent of the revolving door phenomenon. Of 28 former government employees reported in the press to have gone to work for regulated companies or their law firms, at least 20 had personally contacted officials in their former agencies. COMMON CAUSE STUDY 53-54. Of 1406 former military officers who took jobs with defense contractors, at least 379 became employed by firms within their former official jurisdiction. *Id.* 58. Further, of 1712 "senior employees" in government studied, 349 had come from private industry or law firms. *Id.* 41.

provision for scientific and technical personnel,[169] while the regulations promulgated by the Office of Government Ethics treat contracting personnel differently from lawyers in some situations.[170] Are these distinctions arbitrary, or do they make sense?

Should the law distinguish between activities in which a former official was personally involved and those that fell only within his or her official responsibility? As discussed earlier, the federal statute draws this distinction and provides different rules for each case. The American Bar Association Code of Professional Responsibility, for example, does not.

Should the former employee's salary level or the nature of his or her job be a decisive factor, as distinguished from his or her relationship to the particular decision or issue in question? Even after the 1979 modifications, the federal statute draws important distinctions based on the former characteristics, while, again, the American Bar Association Code and even the proposed District of Columbia Bar rules do not.

2. *The Lawyer's Role in Private Life*. Should the law distinguish between a former official's personal intervention before a governmental agency and his giving private advice to another about how to approach the government? The present federal statute prohibits only the former;

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[169] Section 207(f) provides:

> The prohibitions of subsection (a), (b), and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the department or agency concerned, or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.

18 U.S.C.A. § 207(f) (West Supp. 1979).

[170] Compare, for example, the way the regulations treat the issue of what constitutes the same "particular matter" in 5 C.F.R. § 737.5(c)(4) (1979):

> *Example 1*: A government employee was substantially involved in the award of a long-term contract to Z Company for the development of alternative energy sources. Six years after he terminates Government employment, the contract is still in effect, but much of the technology has changed as have many of the personnel. The Government proposes to award a "follow on" contract, involving the same objective, after competitive bidding. The employee may represent Q Company in its proposals for the follow-on contract, since Q Company's proposed contract is a different matter from the contract with Z Company. He may also represent Z Company in its efforts to continue as contractor, if the agency determines on the basis of facts referred to above, that the new contract is significantly different in its particulars from the old: The former employee should first consult his agency.
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> *Example 2*: A Government employee reviewed and approved certain wiretap applications. The prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter as the initial wiretap application. The validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved.

the 1978 amendments, on the other hand, followed the suggestion of Common Cause and prohibited both.[171]

Should it matter whether the former employee's private role before the agency consists of advocacy, inquiry, or some other role? In other words, should it matter whether the employee is seeking to get something more than information from the government? The federal statute seems to be construed to forbid only advocacy,[172] but inquiry is often at least as valuable an activity for private clients.

Should it matter whether the former employee's private role is related to a specific case he handled, cases similar to those he handled, or a more general rulemaking proceeding in which he was involved? Again, the federal statute prohibits only the first situation, but the District of Columbia Bar proposal would regulate the last situation as well.[173]

Should the bar to the former employee's activity extend only to his or her own former agency or should it extend to the entire government? Should a former Air Force contracting officer, for example, be barred from subsequent dealings with the Air Force, the Department of Defense, all "aerospace" agencies (such as the National Aeronautics and Space Administration), or the entire federal government? The nineteenth century statutes had the broadest possible sweep,[174] and, in theory, the present statute does as well. Because the bar is limited to specific matters, however, the practical effect is that the former employee will not be barred beyond his or her own agency.

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[171] This was the significance of adding the words "by personal presence at" to the "aiding and assisting" language of section 207(b)(ii). Common Cause had not been the only proponent of the broader approach; the 1962 report by the Association of the Bar of the City of New York had also called for it. BAR REPORT 292.

[172] Subsections (a), (b), and (c) of section 207 prohibit "any formal or informal appearance before" as well as any "intent to influence . . . any oral or written communication." 18 U.S.C.A. § 207(a)-(c) (West Supp. 1979), *as amended by* Pub. L. No. 96-28, 93 Stat. 76 (1979). 5 C.F.R. § 737.5(a)(3) (1979) treats these concepts together:

> (3) *Appearances; communications made with intent to influence.* An appearance occurs when an individual is physically present before the United States in either a formal or informal setting or conveys material to the United States in connection with a formal proceeding or application. A communication is broader than an appearance and includes correspondence, a telephone call, or other means.

How one is ever "physically present before the United States" is left unexplained, but under these definitions it at least seems clear that the statute does not reach telephone inquiries.

[173] The Board of Governors went beyond the proposal of its Ethics Committee, which had favored a one-year ban. DR 9-101(E) of the present proposal provides:

> For five years after leaving public office or employment, a lawyer shall not personally participate in counseling or otherwise representing any client
> (1) with respect to the adoption of any provision of a proposed rule or regulation of general applicability, if the lawyer previously participated personally and substantially as a public officer or employee in the drafting of or the decision to propose such proposed provision, or
> (2) in challenging the validity of any provision of a rule or regulation of general applicability, if the lawyer previously participated personally and substantially as a public officer or employee in the drafting of or the decision to propose or to adopt such provision.

Final Revolving Door Proposal, supra note 9, at 51.

What restrictions should be placed on dealings with potential future employers while the employee is still in government service? Traditionally, this question has not been deemed a postemployment issue,[175] but there may be a subtle interplay between an employee's decisions while in government service and his hope for a job at the end of that service. If no absolute bar is placed on accepting a job in the industry affected by one's former government agency, for example, should negotiations for that subsequent job be prohibited prior to resigning from federal service?

Should all activity that is related to the former employee's government service be prohibited or only activity that is contrary to the government's interest? For example, should a former employee be permitted to take advantage of information that a private party submitted to the government in confidence? Again, the federal statute appears to limit only actions contrary to the government's interest,[176] although the American Bar Association Code of Professional Responsibility prohibits both.[177]

3. *General Procedural and Enforcement Issues*. How long should

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[174] See text accompanying notes 17-23 *supra*.

[175] Indeed, the question did not come up in the 1978 and 1979 congressional deliberations. The changes proposed were to section 207, while the pressures on present government officials are governed by section 208.

[176] The statutory language in subsections (a)(2) and (b)(2) refers to "particular matter[s] . . . in which the United States . . . is a party or has a direct and substantial interest . . . ." 18 U.S.C.A. § 207(a)(2), (b)(2) (West Supp. 1979), *as amended by* Pub. L. No. 96-28, 93 Stat. 76 (1979). That language has been construed in 5 C.F.R. § 737.5(c)(5) (1979) not to reach *most* subsequent private actions, but "[t]he importance of the Federal interest in a matter can play a role in determining whether two matters are the same particular matter." *Id.*

> *Example 1*: An attorney participated in preparing the Government's antitrust action against Z Company. After leaving the Government, she may not represent Z Company in a private antitrust action brought against it by X Company on the same facts involved in the Government action. The interest of the United States preventing inconsistent results and the appearance of impropriety in the same factual matter involving the same party, Z Company, is direct and substantial. However, if the Government's antitrust investigation or case is closed, the United States no longer has a direct and substantial interest in the case.
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> *Example 2*: A member of a Government team providing technical assistance to a foreign country leaves and seeks to represent a private contractor in securing a contract to perform the same service. The proposed new contract may or may not be considered a separate matter, depending upon whether the United States has a national interest in maintaining the original contract. The agency involved must be consulted by the former employee before the representation can be undertaken.

Id.

[177] ABA CODE DR 9-101(B). See note 68 *supra*.

the bar to postemployment activity extend? Should the answer vary for different kinds of activity? What is the justification, if any, for making the ban permanent? The federal statute establishes a permanent ban for matters in which the employee was "personally and substantially" involved, and a two-year ban for matters within his "official responsibility."[178]

Should the disqualification of a former government employee extend to his partners, associates, or the organization for which he works? If attribution is possible, should it or the employee's own disqualification be subject to waiver by the government? What kind of procedure for waiver should be adopted? Who should be empowered to grant a waiver—the agency involved, the Office of Government Ethics, an independent federal judge? May conditions be placed on the waiver? These considerations constitute a major portion of the difference between the positions of the American Bar Association and the District of Columbia Bar.[179] The federal statute has tended to skirt the issues,[180]

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[178] 18 U.S.C.A. § 207 (West Supp. 1979), *as amended by* Pub. L. No. 96-28, 93 Stat. 76 (1979).

[179] See text accompanying notes 89-94 *supra*. The text of the present District of Columbia Bar proposal is as follows:

> DR 9-102 *Imputed Disqualification of Partners, Associates, and Of Counsel Lawyers.*
>
> (A) If a lawyer is required to decline or to withdraw from employment under DR 9-101(B), on account of personal and substantial participation in a matter other than as a law clerk, no partner or associate of that lawyer, or lawyer with an of counsel relationship to that lawyer, may accept or continue such employment except as provided in (B) below.
>
> . . . .
>
> (B) The prohibition stated in DR 9-102(A) shall not apply if the personally disqualified lawyer is screened from any form of participation in the matter or representation as the case may be, and from sharing in any fees resulting therefrom. In order to ensure such screening,
>
> (1) the personally disqualified lawyer shall file with the public department or agency and serve on each other party to any pertinent proceeding an affidavit attesting that during the period of his or her disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation, will not discuss the matter or the representation with any partner, associate, or of counsel lawyer, and will not share in any fees for the matter or the representation; and that the personally disqualified lawyer will file and serve, promptly upon final disposition of the matter or upon expiration of the period of personal disqualification, whichever occurs sooner, a further affidavit describing his or her actual compliance with these undertakings.
>
> (2) At least one affiliated lawyer shall file with the same department or agency and serve on the same parties an affidavit attesting that all affiliated lawyers are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being taken to screen the personally disqualified lawyer; and that at least one affiliated lawyer will file and serve, promptly upon final disposition of the matter or upon expiration of the period of personal disqualification, whichever occurs sooner, a further affidavit describing the actual compliance by the affiliated lawyers with the procedures for screening the personally disqualified lawyer.
>
> (C) If a personally disqualified lawyer or an affiliated lawyer has stated in accordance with DR 9-102(B) that further affidavits describing compliance with screening procedures will be filed and served upon final disposition of the matter or upon expiration of

and the cases are split.[181]

What should be the sanctions for violating any of the restrictions on postemployment activity? Should there be criminal penalties? Should the government be able to prevent an offending official from participating in the particular matter in question? Should the penalty extend to future dealings with the former agency?[182] What procedures should be devised for enforcing any sanctions?[183]

Should the rules adopted deal only with the departure of employees from government, or with their entrance to government as well? Are the concerns sufficiently similar that they should be treated together? Only the proposed District of Columbia Bar rules deal with government entry;[184] under other rules the door only revolves out.

Who can establish rules relating to the activities of former govern-

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> the period of disqualification, such affidavits shall be filed and served as soon as practicable after they are due.
>
> (D) Affidavits filed pursuant to DR 9-102(B) and (C) shall be public except to the extent that a lawyer submitting an affidavit shows that disclosure is inconsistent with Canon 4 or provisions of law.

Final Revolving Door Proposal, *supra* note 9, at 55-56.

[180] The 1962 version of section 207 seemed to provide expressly that a former employee's disqualification would not be imputed to his or her partners and associates. See note 57 *supra*. That express disclaimer was deleted in the 1978 amendments. It can thus be argued that imputation is now an open issue. However, nothing in the legislative history suggests that this deletion of the last sentence of former section 207 was more than editorial license or that it was intended to have substantive effect.

[181] *Compare* Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977) (a decision disqualifying the former employee but *not* attributing disqualification to the law firm) *with* Armstrong v. McAlpin, 606 F.2d 28 (2d Cir. 1979), *rehearing en banc granted*, No. 79-7042 (2d Cir. Dec. 12, 1979), United States v. Kitchin, 592 F.2d 900 (5th Cir. 1979) (per curiam), *cert. denied*, 100 S. Ct. 86 (1979), Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314 (D. Hawaii 1975) (former deputy attorney general), *and* Handelman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973) (disqualified partner formed firm) (decisions disqualifying law firm *because* of the presence of a disqualified partner or associate).

[182] 18 U.S.C.A. § 207(j) (West Supp. 1979) provides in part:

> If the head of the department or agency in which the former officer or employee served finds, after notice and opportunity for a hearing, that such former officer or employee violated subsection (a), (b), or (c) of this section, such department or agency head may prohibit that person from making, on behalf of any other person (except the United States), any informal or formal appearance before, or, with the intent to influence, any oral or written communication to, such department or agency on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action. Such disciplinary action shall be subject to review in an appropriate United States District Court.

[183] Section 207(j) continues: "No later than six months after the effective date of this Act, departments and agencies shall, in consultation with the Director of the Office of Government Ethics, establish procedures to carry out this subsection." *Id.* Basic guidelines are set out in the regulations. 5 C.F.R. § 737.27 (1979).

[184] Proposed DR 9-101(C) for the District of Columbia Bar provides: "A lawyer serving as a public officer or employee shall not participate in any matter in which he or she participated personally and substantially while in private practice or nongovernmental employment." *Final Revolving Door Proposal*, *supra* note 9, at 49.

ment officials? Should Congress adopt a uniform policy? Should individual agencies be permitted to go beyond the requirements Congress has established?[185] Should bar associations or other professional groups be permitted to establish enforceable ethical standards that are more restrictive than the rules imposed by the statute?[186]

Should a grandfather principle be applied? That is, should the rules that are adopted apply to all former government employees, regardless of when they were employed, or should the rules be enforced only with respect to persons leaving (or *entering*) government service hereafter?[187]

IV. THE COSTS AND BENEFITS OF REGULATING THE ACTIVITIES OF FORMER GOVERNMENT OFFICIALS

As shown in the preceding section, little is known about the nature and extent of the private work of former government officials. Further, the breadth and variety of specific questions that underlie the "revolving door" debate lead to the recognition that even more basic questions must be answered. What is it that former government employees offer subsequent private employers? In what ways, if any, might the government and the public be damaged by a lack of restrictions on the private activities of such former employees? What are the costs, if any, to the government itself when it seeks to regulate these activities?

A. *What Former Government Officials Bring to Private Employers.*

Asking what former government employees have to offer private employers is a particularly useful way to approach the question of what limitations should be imposed. Questions about the experience or other attributes that make former officials desirable employees can never be answered definitively, because every hiring decision is in some way unique. Interviews with Washington lawyers, however, indicate that there are three characteristics of former government officials that stand out as most important.

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[185] Nothing in the statute appears to permit agencies to demand more, although in interviews with this author, staff members charged with drafting the legislation stated that there was no *intent* to limit the agencies. *See* S. REP. NO. 170, 95th Cong., 2d Sess. 155 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4216, 4371.

[186] The Justice Department has specified that it does not believe that the District of Columbia Bar, or any other local bar, should establish its own principles beyond those established by Congress. Letter from Associate Attorney General Michael J. Egan to William H. Allen, Chairman, Legal Ethics Committee of the District of Columbia Bar (Feb. 15, 1978).

[187] The District of Columbia Bar proposal recognized the issue but dealt with it as follows:

> *Proposed Text of Order Adopting The Amendments*
>
> The amendments to Canon 9 made by this order are effective as of the date hereof, except that they shall not be construed to require a lawyer or firm to terminate or withdraw from professional employment with respect to any particular matter as to which disqualification would otherwise apply if the employment with respect to such matter is in progress at the date hereof.

Final Revolving Door Proposal, *supra* note 9, at 60.

First, the former official will normally have acquired considerable expertise with the subject matter of his or her agency. For example, a former official of the Antitrust Division of the Department of Justice will tend to be relatively expert in antitrust law. Although it is possible to obtain comparable expertise working for a private firm, subject matter expertise is nonetheless a primary reason why former government officials are considered attractive and employable. This is especially true in the case of lower level government employees.

Second, former government officials often have a better than usual sense of process. That is, they tend to understand how the government bureaucracy works and how decisions are made. They may know, for example, when it is appropriate and effective to intervene or challenge, and how to prepare the appropriate pleadings or documents. They also tend to be able to sense whether the agency will grant their new employer's desired relief, or whether legislative change will be required.

Third, some former government employees appear to be retained at least partly because they are celebrities. Persons who have been in the public eye may attract clients by their very visibility.[188]

It is difficult to say whether using a reputation attained through government service to gain private employment is inherently improper. An accumulation of experience, understanding, and recognition is almost inevitable for a successful government employee, and is something no reasonable system would seek to prevent.

B. *Problems the "Revolving Door" is Thought to Present.*

Looking beyond these seemingly innocuous reasons for hiring former government employees, one is struck by the lack of consensus on what problems are raised by the revolving door phenomenon. The same Senate committee responsible for the extensive 1978 revisions of section 207, for example, had concluded after careful examination just a year earlier that the problems were relatively slight, and that "we should be cautious in adopting new, more stringent restrictions."[189]

One factor that has confused analysis of the "revolving door" issue has been the tendency to treat it as a question of personal honesty and morality. Certainly the government is entitled to scrupulously honest employees, but most of the revolving door concerns do not involve actual honesty or dishonesty at all. Although morality is one dimension of "ethical" behavior, many ethical issues, including the revolving door phenomenon, can best be understood as accommodating a number of values or concerns about the operation of given institutions—in this case, government agencies.[190] A few of these concerns relate to honesty, others to public confidence, and others to perceptions of fairness. To the extent that appearances of impropriety are more or less widely perceived and are the subject of real concern, they too are appropriate for consideration. Arguments about morality in government, however, can often cloud rather than clarify these issues.

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[188] The process is not necessarily as shallow as it may appear. In the case of lawyers, a company's regular counsel often selects Washington counsel. Thus, professional fame may be more controlling than celebrity status in the usual sense.

[189] S. Doc. No. 25 at 67.

No single critic has set forth all the objections raised to service with an industry one has previously regulated, but six basic objections seem to recur. Perhaps because many of the critics are lawyers, several of the concerns have their roots in general principles of legal ethics.[191]

1. *Protection of Client Confidences*. The concern is sometimes expressed that a former government employee will compromise confidential official information.[192] If a prosecutor has been in the grand jury room interviewing witnesses under oath and in secret, for example, it obviously would be inappropriate for that prosecutor to resign his position and become defense counsel.[193] Likewise, it might be thought improper if a government health official were hired by a drug company

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[190] This treatment of ethical issues as a question only of morality is a recurring problem in the discussion and analysis of legal ethics issues. *See* T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 1-5 (1976); Comment, *The Lawyer's Moral Paradox*, 1979 DUKE L.J. 1335, 1335-49.

[191] The present ABA Code of Professional Responsibility deals expressly with the former government lawyer in DR 9-101(B) and EC 9-3. The Code, however, does not refer directly to the general question of when an individual may take a case that puts him in a position contrary to that of a former client. Such representation is *not* a traditional conflict of interest. The concern represented by the conflict prohibitions of the ABA Code is that the lawyer's independent professional judgment in a *present* case might be affected by an existing conflict. *See, e.g.*, ABA CODE DR 5-105(A), (B) and EC 5-14 to 5-19. There is usually no reason to believe that the lawyer will be less loyal to his present clients because of his representation of a prior client. Indeed, the only reason why the "former client" problem seems to be called a "conflict of interest" is because the old *ABA Canons of Professional Ethics* included this problem with traditional conflicts in its Canon 6. See text accompanying notes 28 *supra*.

[192] *See, e.g.*, the FTC's proposed amendment to 15 C.F.R. § 4.1(b)(3)(iii), which refers to "nonpublic documents or information pertaining to [a] matter . . . [that] came to the attention of the . . . employee or would be likely to have come to his attention in the course of his duties." 43 Fed. Reg. 35,949 (1978). See also the SEC's rule set forth in 17 C.F.R. § 200.735-8 (1979), which bars participation in a matter by anyone who "gained knowledge of the facts" of a case while at the Commission.

[193] *E.g.*, United States v. Ostrer, 597 F.2d 337 (2d Cir. 1979); United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973); Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314 (D. Hawaii 1975).

and revealed to the company current thinking about changes in testing standards. The obligation of any attorney not to "use the confidences or secrets of a client for the advantage of a third person"[194] is continuous;[195] termination of the lawyer-client relationship does not end the obligation. Anytime a lawyer takes a case against a former client, there is at least the possibility that confidential information supplied to the attorney in the prior case will be used contrary to the former client's interests.

The concern that former government employees may compromise confidential government information, however, is not a valid concern in many situations. Certainly in most contract and research relationships, exchange of information is to be desired, not restricted. Even in more adversary situations, the Freedom of Information[196] and Government in the Sunshine Acts[197] have significantly reduced the secrecy in government functions. Further, even if something is confidential one day, it will rarely be so forever, or even for one or two years. Of course, there is certainly still some residue of valid government secrecy,[198] and confidentiality *might* be one justification for some limits on the actions of former government employees.[199] However, one should be wary about too glib an assertion that protection of client confidences necessitates imposing significant restrictions on future employment.

2. *Switching Sides*. It is often argued that there is something inherently and fundamentally wrong when a former governmental official "switches sides" and moves into the private sector.[200] This argument is another adaptation of a longstanding rule of legal ethics—

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[194] ABA Code DR 4-101(B)(3).

[195] *Id.* EC 4-6.

[196] 5 U.S.C. § 552 (1976).

[197] 5 U.S.C. § 522b (1976).

[198] *See, e.g.*, R. Berg & S. Klitzman, An Interpretive Guide to the Government in the Sunshine Act (1978); Litigation Under the Amended Freedom of Information Act (4th ed. C. Marwick ed. 1979).

[199] Perhaps the most serious potential abuse of confidence is one over which section 207 expresses little concern. It is the possibility that a government employee might, in a subsequent private case, exploit inside information that the government obtained by compulsion. The concern is not the compromise of the government's *own* secret; rather, the fear is that a former government lawyer might use information against a private defendant who was compelled to disclose that information under circumstances in which the information would not be normally available to other than a government employee. For example, an Internal Revenue Service agent may acquire information from a tax return that is useful in a subsequent private suit against the taxpayer. *Cf.* Armstrong v. McAlpin, 461 F. Supp. 622 (S.D.N.Y. 1978), *rev'd*, 606 F.2d 28 (2d Cir. 1979), *rehearing en banc granted*, No. 79-7042 (2d Cir. Dec. 12, 1979) (former SEC employee had investigated firm now being sued on behalf of private client).

[200] *See, e.g.*, S. Doc. No. 25 at 68 ("a deep, public uneasiness with officials who switch sides"); Committee on Legal Ethics, D.C. Bar, *Tentative Draft Opinion for Comment in Response to*

the rule that prohibits a lawyer from switching sides in a particular case.[201] A defense lawyer, for example, may not move over to the prosecution table in the middle of the trial. In this situation, the reason for the rule seems obvious: communication of confidential information between attorney and client has likely occurred. The client may believe that this information has been used against him, even if, in fact, the attorney had somehow ignored or not disclosed that information.

Obviously, the argument has little application to former officials other than lawyers. It is not disloyal for a cancer researcher to return to an academic or an industrial laboratory after working at a government laboratory. A retired military officer is not a traitor for continuing his work on a development program after being hired by a contractor. In such situations one could argue that no "sides" are involved or that the government and the private employers are on the same "side." Disqualification should be limited to situations in which there is truly a danger that confidential information will be abused. The general concern about "switching sides" is much too broad to use as a basis for analyzing the propriety of former officials' activities.

Further, even for lawyers, the argument is narrower than it first appears. While the lawyer traditionally may not appear on the other side of the same case, he is not barred from taking *another* case against the former client unless the cases are "substantially related"[202] or the representation would abuse the confidence or secrets of the former cli-

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Inquiry 19, District Law., Fall 1976, at 41 ("a point which the sophisticated attorney and the unsophisticated . . . public are most likely to view in different ways").

[201] The case Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975), illustrates the switching sides problem. Joan Hull had filed suit against Celanese alleging sex-based employment discrimination. Donata Delulio, an attorney on the corporate legal staff of Celanese was actively involved in the defense of the suit, and attended interviews with company personnel and conferences with outside consultants who were helping to prepare the statistical defense. About six months after beginning work on the case, Delulio decided that she had grounds for a discrimination complaint similar to Hull's. Delulio discussed the facts of her own case with the firm representing Hull. Celanese countered by seeking to disqualify Hull's firm. The motion was allowed by the district court, and affirmed by the court of appeals. Even though Delulio had not become counsel for Hull, the court found that Hull's counsel had access to her insights about Celanese and its defense. The effect on Celanese was found by the court to be "no less damaging" than if Delulio had actually appeared for the plaintiffs. *See also* United States v. Trafficante, 328 F.2d 117 (5th Cir. 1964); Hilo Metals Co. v. Learner Co., 258 F. Supp. 23 (D. Hawaii 1966).

[202] The case that first established this rule was T.C. & Theater Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953). Thomas Cooke had been the attorney for Universal Pictures Co. in an antitrust action filed by the government against Universal and several other film producers, challenging the practice of releasing films to a few houses for first-run showing before releasing them to the remaining distributors. Later, Cooke sought to represent a private plaintiff in a treble damage action against Universal for local consequences of the same practices. Cooke asserted that his only role on Universal's behalf had been entering the final order and handling the appeal in the Supreme Court. Thus, he asserted, he had worked only with a "cold record" and had been entrusted with no client confidences. Further, he argued, the government action and the

ent.[203] It is not *disloyalty* to the government client that should be the

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subsequent private action were not the "same case," so that the rule of automatic disqualification should not apply.

Judge Weinfeld rejected Cooke's contentions:

> I hold that the former client need show no more than that the matters embraced within the pending suit . . . are substantially related to the matters or cause of action wherein the attorney previously represented . . . the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the Spirit of the rule relating to privileged communications be maintained. . . . Lawyers should not put themselves in the position "where, even unconsciously, they might take, in the interest of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged relationship." In cases of this sort the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so, then the relationship between the two matters is sufficiently close to bring the later representation within the prohibition of Canon 6. In the instant case I think this can be said.

113 F. Supp. at 268-69. *See also* Government of India v. Cook Indus., Inc., 569 F.2d 737 (2d Cir. 1978); American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1128 (5th Cir. 1971); Motor Mart, Inc. v. Saab Motors, Inc., 359 F. Supp. 156 (S.D.N.Y. 1973).

At least two cases illustrate that courts may expand the "substantial relation" rule far beyond its reasonable scope. For example, in Chugach Elec. Ass'n v. United States Dist. Court, 370 F.2d 441 (9th Cir. 1966), the disqualified attorney had been general counsel for the defendant corporation. After some years in that position, the attorney resigned. Later, he brought suit on behalf of a new client charging his former employer with attempting to destroy the client. All alleged acts occurred after the attorney had left the corporation.

The court's rationale for disqualifying the attorney was that "knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events in an antitrust context and offer a promising source of discovery." *Id.* at 443. Further, the court held that "he was in a position to acquire knowledge casting light on the purpose of later acts and agreements." *Id.*

The attorney in *Chugach Electric* had no inside information as to the events underlying the specific suit. Further, while working for the defendant, he had no way to subvert its position and make his present suit any more likely to succeed. In short, this appears to be a case in which the attorney was improperly disqualified and forbidden to use his background and experience to benefit a plaintiff who allegedly had been wronged.

An even more celebrated example of improper disqualification is Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973). David Rabin, a textile patent attorney, represented licensees of patents held by Burlington Industries and its subsidiary, Patentex, in a challenge to another firm's patent for Supp-hose stockings. Burlington and Patentex were interested in the result of this litigation, because a successful result would allow their licensees to use their patent without fear of infringement of the Supp-hose patent. When Burlington and Patentex intervened in the suit, a counterclaim was filed by the owner of the Supp-hose patent alleging that Burlington and Patentex were attempting to monopolize the field and destroy the defendant's competing patent. Rabin won this first case on behalf of the licensees and Burlington-Patentex.

In the second case, Rabin filed a suit against Burlington-Patentex on behalf of essentially the same licensees when Patentex sought to impose a tougher licensing agreement. Patentex's response was a motion to disqualify Rabin. The district court granted the motion, and the court of appeals affirmed. The court held that the situation required

> [a] strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client or a previous relationship may subsequently be used to the client's disadvantage.
>
> Moreover, the court need not, indeed cannot, inquire whether the lawyer did, *in fact*, receive confidential information during his previous employment which might be

subject of concern.

The switching sides argument appears to reflect a suspicion that lawyers should not defend one side of an issue one day and the other side the next. To do so "appears improper" to some observers, especially if the movement is between government regulator and private practice. Although "appearance of impropriety" is an ambiguous phrase, it apparently refers to the situation in which the lawyer is in a position to be disloyal if he so chooses. Even if an individual lawyer is of the highest moral character, the appearance of impropriety concept seeks to prevent his creating situations in which he cannot demonstrate that he was *not* dishonest.

Ultimately, this argument is unanswerable because the lack of integrity and fairness, if any, is largely in the eye of the beholder. Almost anything might look suspicious to someone. The Fifth Circuit, however, has put the appearance of impropriety in perspective: "It does not follow . . . that an attorney's conduct must be governed by standards which can be imputed only to the most cynical members of the public. . . . [T]here must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur."[204]

> used to the client's disadvantage. Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code . . . .

Id. at 571.

Because the issue of Burlington's relation to Patentex had been raised in a counterclaim in the earlier case, it was held that Rabin could not raise a similar issue on behalf of the plaintiffs in this case. The court's own recitation of the facts of the case makes it appear that, if anything, Rabin was manipulated by Burlington into the situation that the company then relied upon to disqualify him. The "appearance of impropriety" relied on by the court is an important concept, but it is a phrase that can sometimes be used unthinkingly to justify results less equitable than the results they seek to prevent.

[203] Schloetter v. Railoc of Ind., Inc., 546 F.2d 706 (7th Cir. 1976), illustrates the potential sweep of this rule. In this suit for patent infringement, the record showed that the plaintiff's original patent application had been processed and defended from challenges by a Mr. Jeffery. Purely by coincidence, the defendant in the later infringement action was represented by the firm Mr. Jeffery had been with at the time he had represented the plaintiff. Although Mr. Jeffery was no longer a member of that firm, the plaintiff sought to disqualify the defendant's counsel. The court of appeals held that if Mr. Jeffery were attempting to represent the defendant, his disqualification would be required. The confidential information that he was presumed to have would be imputed to the other members of the firm and cause their disqualification. The court held that the district court had not abused its discretion in finding that Jeffery's former firm had failed to overcome the presumption that Jeffery had passed confidential information on to his partners. Further, even though Jeffery had left the firm, he was a member of an "associated firm" in Washington, and thus, for this reason as well, the relationship was close enough to justify disqualification. *Id.* at 711, 712. *See also* NCK Organization, Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976); *cf.* Wilson P. Abraham Const. Corp. v. Armco Steel Co., 559 F.2d 250 (5th Cir. 1977) (counsel had represented codefendant and had access to multidefendant conferences).

[204] Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976). The Senate Government Operations Committee proposed to add to the test the language "or . . . might occur." S. Doc. No. 25 at 43.

Switching sides, in general, does not raise problems of either honesty or specific impropriety. While the interest in preserving client confidences and confidence is critical, the interest of a lawyer in the ability to file a suit to redress real wrongs, and the interest of a client in not having his or her lawyer disqualified, should also be respected. Even the appearance of impropriety concern should not extend beyond taking a private party's side on a particular matter that was the same as or substantially related to one on which the employee worked while in government.

3. *Contacts or Clout*. Recently the most dominant concern arising from the revolving door phenomenon has been the excessive influence of former officials—what in the vernacular is called "clout." The 1979 amendments to section 207 focused on the evil thought to be posed by former employees who were believed to be highly influential within an agency by reason of their personality, knowledge, or contacts.[205]

It is intriguing that no private firm seems to make these assumptions about its employees. That is, if a General Motors officer or employee takes a job with a General Motors supplier, General Motors does not refuse to deal with the supplier out of fear that its remaining employees will not defend General Motors' interest. One might ask, then, why the government should expect less of its employees. One answer may be that, particularly after Watergate, the public is unusually suspicious and concerned about its leaders. This concern may go deeper than Watergate, however, and reflect public knowledge that governmental decisions are frequently important and yet fundamentally arbitrary. Even technical decisions often rest on personal judgments. The decision whether a given contractor is "responsible," for example, will never be wholly free from the judgment of responsible contracting officials. Even choosing winners of research grants involves subjective judgment of very specific criteria. The wisdom of dropping a charge or settling a lawsuit can rarely be reviewed on the merits. Because of the impossibility of judging the ultimate wisdom of some decisions, the structure of the decisionmaking process becomes even more significant.

Once again, however, this idea must not be extended too far. Influence takes many forms. Much of what appears to be an employee's influence may actually be the power or authority of his or her position, power that evaporates quickly upon departure from government. Other people are influential, not so much for the job they once held, but for the next job they may hold. That is, some former officials are influential because they still have political connections and may return to another government position. Even if one were critical of that type of influence, restrictions oriented toward the *former* government position would be an odd way of dealing with it.

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[205] *See, e.g.*, S. Doc. No. 25 at 68 ("concern that former officials may have and exert special influence over agency personnel"); GAO Report 2 ("informal contacts with former colleagues still at the agency"); Common Cause Study 52-53 (ability to hire former officials perpetuates "undue industry influence in federal agencies"); *Tentative Draft Opinion*, *supra* note 200, at 41.

Still other influence is based on the former official's fame. Henry Kissinger, for example, could probably get through on the telephone to most current government officials—whether or not in the foreign policy field—because they would be flattered or curious that he called. But Johnny Carson or Raquel Welch could probably get through equally well. The point is that name recognition, as a form of influence, may be associated with government service, but it is neither limited to such service nor readily amenable to rules related to former officials generally.

Most commonly, clout is viewed in terms of the former employee's personal friendships with people still at the agency. This argument, of course, tends to demean all federal employees. The idea that present officials make significant decisions based on friendship rather than on the merits says more about the present officials than about their former coworker friends. It implies a lack of will or talent, or both, in federal officials that does not seem justified or intended, and it ignores the possibility that the officials will tend to disfavor their friends in order to avoid even the appearance of favoritism. Further, contacts within an agency are not the only way people in government positions form friendships. In addition to neighbors and classmates, people also form friendships in professional organizations and even in adversarial situations. Employment contacts are only part of the friendship problem, if such a problem exists.

4. *Unfair Advantage.* Another complaint is that government service gives some people an inherent and unfair advantage over others.[206] For example, a lawyer who has recently worked for the Federal Trade Commission may be considered better able to represent clients with trade regulation problems than someone without such

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[206] This is the centerpiece in the proposed revision of 16 C.F.R. § 4.1(b) (1980) (section 4.1(b) of the Federal Trade Commission Rules of Conduct). *See also* S. Doc. No. 25 at 68 ("information, influence and access . . . [may be used] to improper or unfair advantage"); GAO Report 2 ("undue industry advantage . . . due to the former employee's knowledge of agency procedures and the decisionmaking process").

experience. If the objection is that the advantage is unfair to the government, then it is little more than a restatement of the previous three objections. If, on the other hand, the argument is that former government officials will prove more attractive to clients or employees than is "fair" to their contemporaries without a government background, then the argument is really a call for economic protection of existing firms or individuals.

To the extent that this argument is a serious objection to general experience and understanding, every person has an "unfair advantage" over every other person because of his or her unique experiences. Persons who went to the Harvard Law School have an advantage over those who attended other schools for some kinds of jobs in some locations. Persons who attend state law schools frequently have a similar advantage over others, including Harvard graduates, for employment and even "influence" in certain other locations. In an efficient economic system, the individual's comparative advantage is put to best use by consumers of the services offered. It is usually cheaper for the client and more efficient for society if the person hired knows the government agency and can perform a service without first having to become educated about the subject. Of course, to the extent that real confidences (or impermissible contacts) are involved, then the "unfair advantage" concern should be recognized as a part of those objections. It does not, however, seem to be an objection that should have much independent significance.

5. *Conflict of Loyalties*. Another concern, also rooted in legal ethics, is that a government employee might be subject to a conflict of loyalties while still in government service.[207] For example, a lawyer who plans to work for the company that he or she is currently charged with prosecuting might be tempted to prosecute less vigorously or to allow error into the trial record in order to allow attack of the judgment on appeal. Similarly, a contracting official might award a contract to the future source of his or her income, or a person seeking an academic job might overlook the weaknesses in a university's accounting for government funds.

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[207] This was of particular concern to the Association of the Bar Committee in 1960: "[T]he greatest public risks arising from post-employment conduct may well occur *during* the period of government employment, through the dampening of aggressive administration of government policies." BAR REPORT 234. *See also* GAO REPORT 1 ("vested interest in acting favorably toward certain companies while with an agency"); *id.* 2 ("appear that the employee . . . is being rewarded for his participation while regulating the industry"); COMMON CAUSE STUDY 52 ("Those who anticipate future employment . . . have a vested interest in acting in behalf of certain companies while in office, or at least in behalf of the industry in general").

This concern about conflicts of interest while an official is employed by the government seems more legitimate than the concerns previously described. Furthermore, this is the only concern that is consistent with traditional notions of conflicts of interest: it is a fear that decisions made *now* will be influenced by the personal interests of the decisionmaker. However, this conflict of loyalties issue is itself more complex than first appears.

Government employees, except perhaps those who entered the government immediately upon graduation from school, also have former *private* employers. When those firms have dealings with the government, it may be convenient to screen the former employees from those dealings. Sometimes, however, screening will not be convenient. In those cases, the government must recognize that the risk of disloyalty is not great enough to justify impeding the agency's ability to act efficiently.

Likewise, because of the skills developed and the experience gained, a person ending a government career is likely to be employed by a firm that deals with the government. Thus, the risk that a present decision will affect a future employer is *inherent* in acting as a government official. Further, because job negotiations inevitably precede hiring, the possibility of affecting a firm with which one is negotiating may be to some extent unavoidable. Disqualification from acting in such situations is the obvious solution in many cases.[208] Again, however, the costs of such disqualification may in some cases be greater than the benefits.

Further, the concern about dishonesty and disloyalty is probably excessive. It is hard to imagine that a private firm would feel secure hiring someone who had just been disloyal to his or her last client—the government. Interviews with lawyers consistently confirm that law firms want the "best" government lawyers—the ones who were hardest to beat—not the least qualified or least vigorous advocates.[209] Government employees probably sense this. Viewed in this light, the conflict of loyalties concern, while not necessarily eliminated, seems less significant.

6. *Imputed Knowledge of Partners and Associates*. Finally, even

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[208] This, of course, is the requirement of section 208, unless the employee gets a waiver from the "Government official responsible for appointment to his position." 18 U.S.C.A. § 208(b) (West Supp. 1979).

[209] *See* Wiley, *Speaking Out Against Ethics Committee Inquiry 19*, District Law., Winter 1976, at 37. The counter argument is that in doing so, the law firms are "buying the [government's] best people." *Tentative Draft Opinion*, *supra* note 200, at 41.

if former government employees avoid direct personal association with cases or issues involving their former agencies, the danger exists that they could act indirectly through their partners and associates. Consequently, some have argued that the disqualification of the former official should extend to law partners or business associates. Again, the argument is derived from principles of legal ethics. Traditionally, the actual knowledge of an attorney was attributed by agency principles to the lawyer's partners.[210] Recently, the rule has been expanded to associates of the attorney; the rationale for this extension was the relatively open access to case files prevailing in law firms.[211] The basic rule is stated in Disciplinary Rule 5-105(D) of the American Bar Association Code: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."[212] Both traditional case law and the American Bar Association Code require disqualification regardless of whether the firm "walls off" the attorney from participation in the case and excludes him or her from legal fees derived from it.[213]

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[210] *See also* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1316-18 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); Laskey Bros. v. Warner Bros. Pictures, Inc., 224 F.2d 824, 826-27 (2d Cir. 1955); Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to that of Former Client*, 55 B.U.L. REV. 61, 70-71 (1975); Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest*, 73 YALE L.J. 1058, 1059-64 (1964).

[211] *See* Consolidated Theatres v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 927 (2d Cir. 1954). In that case an attorney was disqualified after he moved from the defendant's firm to the plaintiff's firm. The court dismissed his assertion that he had been "a mere law clerk" at the first firm, noting that he had had access to the files and had performed other services that "might well have" exposed him to confidential information. *Id.*

[212] ABA CODE DR 5-105(D).

[213] *Id.*; *see* Schloetter v. Railoc of Ind., Inc., 546 F.2d 706, 710 (7th Cir. 1976); Fund of Funds, Ltd. v. Arthur Andersen & Co., 435 F. Supp. 84, 96 (S.D.N.Y.), *aff'd in part and rev'd in part*, 567 F.2d 225 (2d Cir. 1977).

In some cases, however, the courts seem willing to modify the rigid traditional rules to deal with the realities of law practice by large firms. In Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975), one of the plaintiff's attorneys, Dale Schreiber, had worked for an eighty-person firm for three years following his graduation from law school. That firm was general counsel to Chrysler and was representing Chrysler in the suit filed by plaintiff Silver. Schreiber had worked on various Chrysler matters while an associate in the large firm, but he had not been involved in the suit filed by Silver or in any case substantially related to that suit.

The court acknowledged that disqualification is appropriate when an attorney may use confidential client information against that client. However, contrary to the usual rule, it found that the inference that any attorney received confidential client information from former law associates would be rebuttable. It was important, the court argued, that the law "not unnecessarily [constrict] the careers of lawyers who started their practice of law at large firms simply on the basis of their former association . . . ." *Id.* at 754. The court found the relevant distinction to be between lawyers heavily involved in a matter and those "who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions. . . . Under the latter circumstances the

Whether these rules permit a waiver of this disqualification is not entirely clear.[214] The applicable American Bar Association Code provision is Disciplinary Rule 4-101(C)(1), which allows a lawyer to "reveal: . . . Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them."[215] If a lawyer seeks to represent a new client in a suit against a former private client, he needs the former client's consent after full disclosure. Full disclosure would arguably require the attorney to advise the former client of the seriousness of the consequences of his taking the present case. That advice could be self-serving, however, and indeed it might compromise the interests of the present or proposed client if the attorney has to explain to the potential defendant the details of the proposed represen-

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attorney's role cannot be considered 'representation' . . . so as to require disqualification." *Id.* at 756-57. The court stated:

> [No client] of a law firm can reasonably expect to foreclose either all lawyers formerly at the firm or even those who have represented it on unrelated matters from subsequently representing an opposing party. Although Canon 9 dictates that doubt should be resolved in favor of disqualification . . . it is not intended completely to override the delicate balance created by Canon 4 and the decisions thereunder.

Id. at 757 (citation omitted). In the Seventh Circuit, on the other hand, such a "realistic" approach to disqualification has been rejected. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1318 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) ("The district court also erroneously permitted itself to be influenced by the size of the law firm involved").

Whether two lawyers are actually members of, or affiliated with, the same firm is not always clear. This problem is best illustrated by American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971). In that case, plaintiff American Can was represented by both a national law firm and locally retained counsel in a suit to collect a judgment against Citrus Feed Co. One of the local firm's partners was at the same time representing Citrus Feed in a tax matter. The district court held that the tax attorney's actual knowledge of Citrus Feed's confidences disqualified his firm from participating in the collection action, and that the local firm's knowledge was then imputed to the national firm, thereby disqualifying it from representing American Can.

The Fifth Circuit reversed as to the national firm. (The local firm had previously withdrawn from the case). The court noted that there was no proof that the confidential disclosures in the tax matter were substantially related to the collection matter, but the decision did not rest only on that ground. While acknowledging the importance of safeguarding attorney-client confidences, the court held that ethical principles did not require disqualification of the national firm. The court expressed concern that double imputation of knowledge would lead to "consequent disqualification . . . *ad infinitum*." *Id.* at 1129. Although the two firms had acted together, the court stressed that no employer-employee relationship existed between them. Rather, American Can had employed and paid both. The court found that the two firms were not "associated" simply by having this common client.

[214] Under the ABA Code of Professional Responsibility, mere waiver is not enough. A lawyer may represent two clients only "if it is obvious that he can adequately represent the interest of each." ABA CODE DR 5-105(C). Of course, DR 5-105(C) could not literally apply to the revolving door situation because it only relates to the waiver of a conflict between two *present* clients. The importance of the language for our purposes, however, is that it does not allow the clients to waive disqualification in all cases; it requires the attorney to make a judgment of his own. It is only after the attorney is himself satisfied that his independent judgment will not be compromised that the issue of waiver even arises.

[215] ABA CODE DR 4-101(C)(2).

tation. Further, the former client has no obvious incentive to give his consent. Almost certainly, the former client will be worse off if the former lawyer takes the case than if the potential plaintiff has to find and pay to educate someone new. It seems unreasonable, then, to expect that the withholding of consent by a former client—private party or government agency—will be a valid indication that disqualification is really necessary.

Recognizing that an entire firm should not necessarily be disqualified because a former client refuses consent, many observers have concluded that the principle of Disciplinary Rule 5-105(D) should not be extended to government employees. The proposals of the American Bar Association, the Association of the Bar of the City of New York, and the District of Columbia all concurred with this position.[216] The Court of Claims, as well, in *Kesselhaut v. United States*,[217] recognized the impropriety of disqualifying an entire firm when screening procedures would be effective.

> Should an attorney . . . ineluctably infect all the members of any firm he joined with all his own personal disqualifications, he would take on the status of a Typhoid Mary, and be reduced to sole practice under the most unfavorable conditions. . . . [T]he withholding of consent by the Government, as here, [should not] be binding on us if, as here, it appears now to be unjustified.[218]

Kesselhaut was not the last word. As previously discussed,[219] the Second Circuit in *Armstrong v. McAlpin*[220] adopted a rule barring the entire firm—at least whenever a partner or associate had been personally and substantially involved in a matter while in government employment—because "it must appear to the public, that there will be no possibility of financial reward if [the employee] succumbs to the temptation to shape the government action in the hope of enhancing private employment."[221]

Any opinion such as that of the Second Circuit that is based on the *appearance* of impropriety is extraordinarily difficult to analyze. That such an appearance may exist to the judges deciding the case is a point that no observer can challenge. However, one can ask whether such an appearance is reasonable and in this case it seems clear the court should have reached a different result.

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[216] See notes 80, 89-94 *supra* and accompanying text. The Senate Government Operations Committee agreed with the ABA position, *see* S. Doc. No. 25 at 87, and the approach was also adopted by the Office of Personnel Management in 5 C.F.R. § 737.21(b) (1979).

[217] 555 F.2d 791 (Ct. Cl. 1977).

[218] *Id.* at 793-94. On the other hand, eight of the nineteen members of the D.C. Bar Ethics Committee believed no waiver should be permitted at all. D.C. Bar Proposals 48.

[219] See notes 132-44 *supra* and accompanying text.

[220] 606 F.2d 28 (2d Cir. 1979), *rehearing en banc granted*, No. 79-7042 (2d Cir. Dec. 12, 1979).

[221] 606 F.2d at 34.

First, the same factors that convinced the court that there was no *actual* impropriety could have led just as easily to the conclusion that there was no *appearance* of impropriety. The law firm was retained six months after its new associate, Altman, had left the government, and it was retained by the receiver with full knowledge that Altman could not play any role in the matter. The receiver who hired the law firm had been named well over a year before Altman left the government, and there was at least no overt suggestion that Altman had had any role in the selection of that receiver.

Second, the court rested its decision in part on the premise that Altman might have seemed tempted to work less vigorously for the government because he wanted a job with this private firm.[222] However, even assuming a firm would hire him on this basis,[223] the interest of the private firm and its client were consistent with that of the government. Because there was no confidentiality issue involved, it is difficult to understand what Altman could have done that would have actually or apparently compromised his work for the Securities and Exchange Commission.

Third, it seems inappropriate to allow a private litigant to raise an objection that purports to protect only the interest of the government. There is no suggestion that Altman would be able to use contacts he had at the Securities and Exchange Commission to abuse McAlpin's rights. Instead, the Second Circuit relied on a government interest that was already redressable by the *government* under section 208,[224] and created a remedy that does little more than make it more time-consuming and expensive for the plaintiff to pursue his private action against someone the government has already determined to be a wrongdoer.

In sum, the Court of Appeals for the Second Circuit in *Armstrong*, in its concern about the possibility of impropriety, established a rule whose arbitrary application seems likely to create significantly more costs for litigants, including the government, than benefits. The position taken by the Court of Claims in *Kesselhaut*,[225] the Fifth Circuit in *Woods v. Covington County Bank*,[226] and all of the bar associations that have considered the question[227] seems clearly preferable.

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[222] *Id.* at 32-33.

[223] See note 209 *supra* and accompanying text.

[224] Section 208 prohibits a government employee from participating in any matter in which his future employer has a financial interest. See text accompanying note 55 *supra*.

[225] See notes 217-18 *supra* and accompanying text.

[226] 537 F.2d 804 (5th Cir. 1976). See note 204 *supra* and accompanying text.

C. *Costs Imposed By An Overly Restrictive Rule.*

Although none of the six bases used here for restricting the private activities of former government employees should be discounted completely, the apparent significance of each seems to fade rapidly upon analysis. A further consideration in creating these revolving door rules is the costs created by an overly restrictive approach. One of the problems in analyzing the revolving door issue has been that the rules frequently have been drafted by lawyers to address lawyers' problems. Even in our regulated society, the majority of government employees are nonlawyers, and the rules fail to accommodate the problems faced by these nonlawyers.

Contracting officials, for example, are often a crucial interface between the private sector and the government. The government official distributing grants for cancer research and the private researcher are not opponents. They both have the same motiviation: to conquer cancer. In this sense, there is no analogy to the lawyer who moves from one client to another. On the other hand, in the award and funding of cancer research contracts, the private contractor (whether or not nominally a not-for-profit institution) may be expected to want an increase in the funds available for the work, while to some extent, it will be in the government's interest to constrain the level of funding.[228] The contracting area, then, is a peculiar combination of teamwork and conflict, but in very few senses is it amenable to rules developed for lawyers.

Further, even to the extent that the lawyer analogy is helpful, the assumption that rules relating to private lawyers can be transposed to the government setting is questionable. For example, there is an extensive body of case law concerning the private lawyer's obligation not to take a case contrary to the interest of a former private client, at least when to do so might abuse the confidences and secrets of that private client.[229] Such a rule is understandable and imposes relatively few costs on the private sector. If one law firm is obliged to turn down a case under the rule, many other firms are available. In general, the number of such cases is likely to be relatively small and of relatively little consequence to any given firm. The government, on the other hand, preempts many fields. If a tax lawyer were barred from all tax cases because he or she had worked on regulations for the Internal Revenue Service, the sanction would not be the denial of a few cases; it would be the inability to practice the profession for the prescribed period. In addition, the government obviously employs many times more people than any individual firm. Thus, the consequences of any of its rules are substantially more widespread and pervasive. Neither of these observations demonstrates that the private lawyer analogy is never useful. They do suggest, however, that an assessment of the appropriate rules to be ultimately adopted must also take into account the countervailing costs created by an overly restrictive policy.

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[227] See note 216 *supra* and accompanying text.

[228] The 1979 changes to section 207 essentially eliminate the barriers to university officials moving from federal jobs to nonprofit or university positions administering contracts they granted. This analysis suggests that "not-for-profit" organizations may in fact present many of the same concerns that Congress was worried about.

[229] See authorities cited in note 210 *supra*.

The Congressional Budget Office estimated that the cost of the 1978 amendments to section 207 was zero.[230] As an estimate of budget impact, that was perhaps optimistic; as an estimate of social cost, it was clearly wrong. Unfortunately, no realistic estimate of social impact has even been attempted, but an understanding that there is such an impact is essential. The social costs take at least four forms: problems created for government recruitment, inhibitions on the independence and creativity of persons in government service, a reduction in freedom of choice for former employees and the persons consulting them, and a loss to society through a balkanization of government service and thus a lessening of the perception of public service as a desirable part of a broad career.

1. *Problems for Government Recruitment*. "To make government service more difficult to exit can only make it less appealing to enter."[231] A professional person usually has only one commodity for sale—his or her skill and judgment. Economists call this "human capital," and one of its primary components is experience. The fact that an attorney worked on the assembly line of an automobile company while in law school, for example, may give him or her unusual insights into the way cars are made. Indeed, any individual builds up a store of experiences and information during a lifetime, and it makes economic sense, for both the individual and the economy, for that human capital to be expended in the most effective way.

Human capital is not only of great personal value to the professional; it is, taken collectively, a national asset. Government employees develop experience and understanding during their periods of service that later make them valuable to private clients. These insights and experiences are often unavailable in the private sector except from other former government employees, and, if private clients cannot call upon these former officials, they may get poor advice or more expensive advice, or both. Reliance on this experience in the private sector is no more inappropriate than is the former auto worker's handling a case against an auto company.

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[230] H.R. REP. No. 170, *supra* note 116, at 162-63.

[231] Remarks of Federal Trade Commission Chairman Calvin Collier before Council on Younger Lawyers, 1976 Annual Convention of the Federal Bar Association (Sept. 16, 1976), *quoted in* S. DOC. No. 25 at 65.

Depreciating the value of the human capital that a government employee accumulates will discourage people from seeking government employment. Although individuals do not enter government service solely to have something to sell when they leave, as individuals evaluate careers and consider whether to accept a government position, they see the ability to gain experiences they can use later as a part of the compensation for the position. Restraints placed upon their subsequent employment will reduce this apparent compensation, and eventually will affect the number and type of people willing to enter government service.

It is useful to break down professional life into at least three periods. First, most professions have an apprenticeship phase lasting from five to ten years. During that period, the individual does some professional work, but an equally important aspect of this period is gaining experience that allows him or her to move on to the next stage. The next stage, also generally lasting about ten years, is the "junior partner" level. At this stage more independence is possible, and during this period most people achieve the levels within their profession that they are likely to sustain throughout their careers. The third and longest phase is one in which individuals continue working at their careers, but frequently supervise others and act in a managerial or "senior partner" capacity.

These distinctions are important because the government needs people at all three levels. Although individuals pass through all three stages within the government, even those who make the government a "career" usually do not commit their entire professional lives to government service. Instead, they retire after twenty-five to thirty years and have a significant number of productive years remaining.

As the rules on postemployment activities become more restrictive, it inevitably will be more difficult to get people to accept government positions during one or more of these phases of their careers. Suppose two students graduate from law school in the same year. One goes to a law firm and the other to the Federal Trade Commission. After five years, the private lawyer may expect to be close to a partnership in his firm, having been educated in that firm's procedures and in the substantive problem areas in which he will concentrate. The Federal Trade Commission attorney, with no position in a private firm, will only have received experience that might make her equally attractive to private clients. If that experience is deemed comparable by the job market, then her time with the agency will have been well spent. However, if the experience that she has obtained may not be used in her subsequent career, then her time in government service may well have been wasted. Indeed, if she is prohibited as a private attorney from working on cases involving the government, then her period of government service will have been a significant detriment to her career. One does not have to be committed to the view that all human decisions are economically motivated to see that, if postemployment activity is more severely restricted, the experience gained in government service will become less valuable and, therefore, such service will become less attractive.

Perhaps even more significant is the probable effect on the recruiting of senior people for short-term government service. People in the second and third phases, the junior partner and senior partner levels, are likely to be earning large incomes. They must make significant financial sacrifices in order to take government positions. Consider a person making $120,000 a year in securities law, for example, who is offered a seat on the Securities and Exchange Commission paying $60,000. If the $60,000 annual sacrifice is compounded by the knowledge that his practice of securities law will be restricted when he returns to private life, he may conclude that the sacrifice is too great.

The number of desirable public servants who would accept government employment but for postemployment restrictions is unknown. The Carter Administration reportedly found that no one declined a Cabinet position for the stated reason that he or she would not be willing to comply with postemployment restrictions.[232] However, the experience of recruiting individuals for highly prestigious, visible positions is not necessarily analogous to the experience of recruiting for thousands of other responsible but less glamorous government positions.[233]

2. *Effects on Official Independence*. The second and less fre-

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[232] For commitments made by the appointees, see 35 CONG. Q. WEEKLY REP. 56-57 (Jan. 8, 1977).

[233] At one point in the debate over the District of Columbia Bar proposals, the chief legal officers of nine Cabinet departments objected to the effects the proposals would have on recruitment. *Bar's "Revolving" Door Plan Attacked*, Washington Post, Oct. 10, 1978, § A, at 3, col. 3. *See also* Internal Revenue Service Chief Counsel's Advisory Committee on Rules of Professional Conduct, 41 Fed. Reg. 41,106, 41,113 (1976).

quently discussed cost of restrictions on postemployment activities is their potential impact on employees' freedom and flexibility while in government. As one interviewee said, "A bureaucracy is only as good as the market value of the bureaucrats on the outside." An individual who has the security of knowing he or she can find private employment upon leaving the government is free to work vigorously, challenge official positions when he or she believes them to be in error, and resist illegal demands by superiors. An employee who lacks this assurance of private employment does not enjoy such freedom.

By unfortunate coincidence, Congress adopted federal civil service reform measures at the same time that it tightened restrictions on postemployment activity. According to the Civil Service Reform Act of 1978,[234] certain federal officials in grades GS-16, GS-17, and GS-18, or Levels IV and V of the Executive Salary Schedule are eligible for the Senior Executive Service. While these senior executives are afforded substantial civil service protection, a system of performance ratings, incentive pay, and nonconsensual reassignments was established that considerably increased the power of top-level agency administrators.[235] The object of these changes was to establish in the administration of government agencies some of the standards of performance accountability utilized by private business. That, in itself, is not objectionable. However, government's postemployment restrictions have no private analogy. Thus, the combined effect of the new laws does not create a situation of comparability with private business, but rather a situation in which senior government executives are substantially more locked in and dependent upon their superiors' rating. The restraints thus imposed on independence and honesty in government service may be significant. Any system that affects the right to take a new job affects the ability to quit the old job, and any limit on the ability to quit inhibits official independence.

3. *The Effect on Personal Freedom of Employees and Those Who Employ Them*. Typically, cost-benefit analysis focuses primarily on costs that can be expressed in dollars or in losses of government efficiency. That is understandable, given the way most cost-benefit issues are posed, but in a free society some other costs are also relevant.

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[234] Pub. L. No. 95-454, 91 Stat. 1111 (codified in scattered sections of 5 U.S.C.A. (West Supp. 1979)).

[235] The relevant provisions may be found at 5 U.S.C.A. §§ 3391-3397 (West Supp. 1979) (appointment, reassignment transfer, and development); 5 U.S.C.A. §§ 3591-3595 (West Supp. 1979) (removal, reinstatement, and guaranteed placement); 5 U.S.C.A. §§ 4311-4315 (West Supp. 1979) (performance appraisal); 5 U.S.C.A. § 4507 (West Supp. 1979) (awarding of ranks); and 5 U.S.C.A. §§ 5381-5385 (West Supp. 1979) (pay).

Many individuals, while not wishing to work permanently for the government, would like to spend some time in public service. Restrictions that deter these persons from fulfilling their desire for government positions represent a significant cost affecting the freedom of those individuals to plan their careers.

Similarly, these restrictions impose costs on potential employers of the former government official. A university that cannot hire an experienced government research scientist must hire someone less experienced. A client who cannot hire a lawyer experienced in commodities law must, in effect, pay to educate a lawyer less experienced. A company that cannot rehire its vice-president because he or she worked as a presidential appointee has lost a major investment in that man or woman. Although these illustrations suggest a less fundamental loss of personal freedom than the examples involving employees, losses to potential employers can be real and significant.

4. *Dangers of Creating a Class of Professional Civil Servants*. The final cost follows from the first three. As the "door" is constrained from "revolving," fewer people will pass through it. The result will be a more complete separation of government lawyers from those who engage in private practice. At a minimum, it will tend to make the academic community the only source of persons free to take relatively short-term government positions.

Such a result creates at least three problems. First, government will be denied the influx of views from outside the government. It is one thing to hear the view that the agency's policies need change expressed by advocates; it is quite another to have to deal with insiders who want change. Barriers to government service entry created by severe problems upon exit will likely lead to more rigid attitudes within the agencies and tend to create a Mandarin class less consistent with the democratic ideal.

Second, such barriers often block those who could receive the most benefit from government experience. Among the opponents of revolving door limitations have been minority groups who have seen government service as an important route to private sector jobs.[236] Black law students, for example, have avoided discrimination by taking federal positions and then used their experience and demonstrated skill to secure jobs in law firms that might otherwise have been reluctant to hire them. It is not only the wealthy and powerful that move through the revolving door.

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[236] *E.g.*, Comments of the Washington Bar Association before the District of Columbia Court of Appeals in connection with the proposed amendment to Canon 9 and ancillary amendments to its Disciplinary Rules (July 9, 1979).

Third, on a practical level, the interchange of persons often works directly in the government's interest. Government alumni often help communicate policies and attitudes of their agencies better than books or speeches. After retiring to a private role, the former government official may retain some of the attitudes and insights acquired while in government. A former Justice Department or Securities and Exchange lawyer may set a tougher compliance program for his or her client than a nonalumnus of those agencies.[237] Because former alumni of an agency may prove to be some of its best friends, the closing of the revolving door may prove more harmful than helpful to the agency.

V. PROPOSED APPROACH TO THE PROBLEM OF DECIDING WHEN PARTICIPATION BY A FORMER AGENCY EMPLOYEE IS INAPPROPRIATE

A. *Some General Concerns.*

This Article has suggested that—because rules may limit the attractiveness of government positions and may reduce employee creativity in those positions—individuals, government, and the public all have something to lose from the imposition of arbitrary rules upon the activities of former government employees. The rules, therefore, should be tailored to limit only those situations that pose problems of real abuse of the public trust. In most cases, theoretically and practically, the former government employee should be afforded the opportunity to develop and exploit his or her "human capital."

In addition, the rules should be explicit, an objective not met by section 207. Several interviewees echoed the observation made by Judge Kaufman over twenty years ago that an accusation of unethical conduct can be as serious to a person's career as a conviction of misconduct.[238] If rules are vague or if regulations are necessary to ensure that certain activities are permissible, the risks of being exposed to possible press or public allegations of violations may be too great for many people to assume. Inevitably, complex problems do not admit of easy solutions, but clarity and certainty as to what the applicable rules require in a given case seem essential objectives.

B. *The Analytical Questions Revisited.*

1. *The Role of the Employee While in Government.* First, it seems that law *should* draw distinctions based on the nature of the govern-

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[237] *See* GAO REPORT 2.

[238] See notes 36-40 *supra* and accompanying text.

ment job. Technical personnel who provide information in a common undertaking with the government present problems different from those raised by persons who negotiate the financial or other relationships between the government and private sector firms. Lawyers should not be distinguished from contract negotiators and administrators, for example, but these persons should be distinguished from researchers whose private work can be almost identical to the work they were doing for the government.

The distinction between personal involvement and official responsibility *does* seem to be an important one. Indeed, the concept of official responsibility pertains to little of real substance. An official cannot know confidences about matters in which he or she was not involved, nor can he or she abuse the government's interest regarding decisions that were not his or hers to make. Likewise, whether or not a matter was within one's official responsibility has little impact on a person's actual influence. In this respect, the approach taken by the American Bar Association Code of Professional Responsibility is better than that taken in the federal statute.

The "official responsibility" concept was a reaction of the Association of the Bar report in 1960 against the *Standard Oil* decision.[239] It went too far. Interestingly enough, none of the interviewees contacted in the course of this study seemed troubled at being excluded from matters within their official responsibility. Ideally, however, if one were rewriting the law and regulations, one should make disqualifying only those matters in which the individual was personally involved.

For the same reasons, the employee's salary level or job title should not be a basis for imposing restrictions. These factors do not necessarily determine the specific types of decisions or information for which the employee is responsible. Moreover, the cost of such rules is extremely high, because they affect people being recruited for the hard-to-fill jobs in the senior ranks of the civil service and the less visible executive level appointments—people who are likely to refuse government service out of concern about these restrictions—rather than affecting the high-level presidential appointees.[240]

2. *The Lawyer's Role in Private Life*. Turning to the official's role after leaving government service, the distinction between personally appearing before an agency and privately advising a client is more complex than it may seem. Participants in the congressional deliberations apparently assumed that influence was the only major concern of

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[239] See notes 50-53 *supra* and accompanying text.

[240] See notes 232-33 *supra* and accompanying text.

the statute, and, therefore, that personal intervention should be the only matter of concern.[241] On the other hand, if the abuse of confidential information or insights is also a concern, then private advice would be at least as serious an evil as personal appearance. As argued earlier, it does not seem that either concern is likely to present a serious problem in most cases. Further, agencies vary in the extent of their truly confidential information and the extent of their relatively unreviewable or "arbitrary" discretion. Thus, it seems that the issue of barring personal intervention or private advice, or both, is appropriate for individual agency regulation subject to the approval of the Office of Government Ethics.

The distinction between a former employee seeking information and one pleading a cause is also often far from clear. Judicious questions will often move a matter ahead in the agency decisionmaking process, a result that may be as effective as any advocacy. Abuse of confidential information could occur in either role, but possession of improper influence is less dangerous in the information-seeking role than in the advocate role. Thus, the provision in section 207[242] limiting the prohibition on high level employees to actual attempts to influence the former agency, while broadening the prohibition on persons with substantial personal involvement, seems the sensible approach.

On the other hand, distinctions should be made on the basis of whether the private role is related to a specific case the person handled, a later similar case, or a later rulemaking proceeding. The first should be highly restricted, while the last two require very little or no restriction. In a rulemaking proceeding, the range of interests expressed is normally so great and the questions are usually at such a high level of policy that no one individual could distort the results. Likewise, while later similar but unrelated cases may be the subject of less public attention, only the concern about undue influence could have any validity. Only in cases or projects actually handled by the employee could the abuses of both confidential information and undue influence pose a threat. Thus, the approach taken by the American Bar Association Code and the federal statutes seems far superior to that of the proposed District of Columbia Bar rules.[243]

The bar to postemployment activity certainly should *not* be extended beyond the employee's former agency. Indeed, the authority in section 207 to limit the bar only to actions before a part of the former employee's agency or department should be retained. Of course, the prestige that an individual has at a given department may extend to other government agencies, so that if prestige is to be condemned, agency boundaries have little meaning. However, because postemployment restrictions must end at some point, the lines drawn in section 207(c) seem a reasonable compromise.

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[241] *See, e.g.*, S. Doc. No. 127 at 73-77.

[242] 18 U.S.C.A. § 207 (West Supp. 1979), *as amended by* Pub. L. No. 96-28, 93 Stat. 76 (1979).

[243] See notes 172-73 *supra* and accompanying text.

The government clearly should be interested in the conduct of employees in job negotiations before leaving government service. However, it is particularly difficult to formulate specific rules to regulate this conduct without excessively restricting the government official's ability both to handle day-to-day business and to establish a smooth transition to private life. Perhaps the best solution would be to require the individual to inform his or her agency superiors of any job negotiations that might affect his public responsibilities. If possible and consistent with the government's needs, he or she could be removed from cases involving those firms. If, from the government's position, it is not convenient to remove the official, then he or she should not be barred from such dealings. A record should be made of any such incident and filed with the Office of Government Ethics both to verify that the employee openly reported his or her actions and to document why he or she was not removed from the dealings.[244]

Finally, prohibition of conduct consistent with the government's interest may seem one of the subjects of least concern, but further reflection suggests that it may be one of the most important. For example, if the government receives confidential information from a private firm, the government official who has had access to that information may indeed have an unfair advantage that will be detrimental to both the private firm, which has been effectively misled, and the government, when it seeks further information. In such a case, it may be shortsighted for the government to prevent, as it does in section 207, only subsequent activity affecting the immediate interest of the government.

3. *General Procedural and Enforcement Issues*. The length of the bar to postemployment activity is, again, a function of the objectives to be served. In this connection a useful concept is that of the half-life, which scientists apply to atomic particles. While radioactivity lasts for a long time, half of it is dissipated within a specific, relatively short time. Similarly, influence and confidential information are wasting assets as former friends leave the agency and as new policies are formu-

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[244] Section 208 already requires notification by the employee. This proposal seeks to clarify how the agency is to deal with that notice.

lated by succeeding administrations. To formulate a cooling off period for former employees, one must attempt to calculate the rate of decay of influence and confidences. That is obviously difficult to do, but the interviews done for this Article suggest that the half-life of such assets is indeed short. The one-year "cooling off period" provided now by section 207(c) is probably a realistic one. The permanent bar against participation in matters with which an individual was personally and substantially involved is derived from the traditional rule for attorneys in private cases and may be realistic in long, protracted lawsuits, but its application to the general issues of government is questionable.

The problems of attribution have been among the most difficult. The decision in *Armstrong v. McAlpin*[245] prevents ignoring the problem any longer. Because a statute probably cannot address all possible cases, the courts should be able to require disqualification when there is some showing of *actual* impropriety. However, contrary to the court's approach in *McAlpin*, the agency's view of when its interests need protecting should be given significant weight in the court's decision. The position taken in American Bar Association Formal Opinion No. 342,[246] therefore, seems appropriate.[247]

Of course, nothing is sacrosanct about the size of large Washington law firms, the chief beneficiaries of the American Bar Association's approach. Lawyers could practice in smaller organization units, as in England.[248] However, it does not seem reasonable to require, in effect, such smaller units through a broad attribution rule unless something affirmative is to be gained. The interviews done for this Article suggest that walling off disqualified firm members can and does work. Furthermore, a formal waiver approach does not appear desirable.[249] As the court realized in *Kesselhaut v. United States*,[250] the issue really ought not be discretionary; screening is either effective or ineffective.[251] At most, requiring a firm to file an affidavit about the screening might be necessary to assure all persons that the firm and the former official recognize the obligation. The injury to reputation and the potential financial loss from a failure to screen properly are probably sufficient incentives to guarantee that the required separation will be maintained.[252]

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[245] 606 F.2d 28 (2d Cir. 1979), *rehearing en banc granted*, No. 79-7042 (2d Cir. Dec. 12, 1979). See notes 219-27 *supra* and accompanying text.

[246] ABA OPINION, NO. 342, *supra* note 74.

[247] See notes 74-80 *supra* and accompanying text.

[248] Barristers in England do not form any partnerships at all, largely to avoid the possibility of imputed disqualification. *See generally* W. BOULTON, A GUIDE TO CONDUCT AND ETIQUETTE AT THE BAR 58-63 (6th ed. 1975).

[249] See note 214 *supra* and accompanying text.

[250] 555 F.2d 791 (Ct. Cl. 1977). See notes 217-18 *supra* and accompanying text.

[251] The prevention of indirect benefit to the former employee is difficult if the employee works for a corporation, because the security of his paycheck is enhanced if the company makes money instead of losing it. However, the concern about attribution is a traditional concern about lawyers rather than about people in business.

The criminal penalties for violating the restrictions on postemployment activity are largely archaic and should be eliminated. Criminal penalties were instituted in 1948 when the prohibition was still aimed at preventing fraud in the narrow activity of prosecuting specific claims against the government.[253] However, most of the restrictions of concern today do not involve fraud. Instead, they involve appearances or theoretical possibilities for abuse, and thus the criminal penalties have not often been enforced.[254] If the statutory rules were narrowed—for example, if they prohibited only the switching of sides in a specific case, or the failure to screen a disqualified former official, or overt acts of favoritism to a potential future employer—then some criminal sanction might be appropriate. For most violations, such as the appearance of impropriety, however, the type of administrative remedy created by the 1978 amendments to section 207 should be the sole remedy for enforcement.

The revolving door turns into the government, as well as out of it, and the rules adopted should deal with both phenomena. Only the District of Columbia Bar proposal currently does so.[255] As with restrictions applicable to persons leaving the government, restrictions applicable to persons entering the government should be narrowly drawn.

Congress and individual agencies, rather than bar associations, courts, or professional groups, should establish rules relating to postemployment activity of federal officials. Whatever rules are adopted have important costs associated with them, both for the individuals involved and for the effective operation of government programs. Thus, it is inappropriate for an outside professional association to create or impose such costs for the government.[256] As the earlier statistics showed,[257] some individual agencies face unusual problems; Congress, therefore, should expressly grant agencies the authority to modify or even to go beyond the basic restrictions imposed. However, in the interest of simplicity, careful evaluation of the competing costs and benefits, and maximum practical uniformity, even agency rules should be subject to the approval of the central Office of Government Ethics.

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[252] Violation of the representations in the affidavit presumably would also make at least one member of the firm guilty of perjury.

[253] See notes 24-26 *supra* and accompanying text.

[254] Between 1970 and 1976, the Justice Department brought five cases and obtained one conviction. GAO REPORT 9.

[255] See note 184 *supra*.

[256] This position was vigorously defended by the Department of Justice in its Memorandum to the Ethics Committee of the District of Columbia Bar (Feb. 15, 1978). A copy of this memorandum is in the files of the District of Columbia Bar.

[257] See notes 150-56 *supra* and accompanying text.

Finally, people base decisions about their lives and careers on the types of rules discussed in this Article. Thus it seems unfair to impose any new restriction upon people who have already made such decisions. If more restrictive rules are adopted, they should be applied only to persons subsequently entering government; they should not apply to persons who have already left government or to persons currently in the government, unless a reasonable transition period is established in which people may resign if they do not wish to be bound by the restrictions. If the recommendations of this Article were adopted, of course, the new restrictions on government employees would not be as great as they are currently.

C. *Specific Proposals*.

The two years of frustrating legislation and the partial repeal of section 207[258] have probably left Congress with little interest in addressing the revolving door issues again in the near future. However, the remaining controversy and counter proposals such as that of the District of Columbia Bar make the taking of some concrete steps to simplify and clarify the law in this area seem desirable.

First, the problem of postemployment activities of former federal employees is too complicated and the distinctions between permissible and impermissible conduct are too fine to be handled by a criminal statute. The current federal law[259] should be replaced with a new statute providing for civil or administrative enforcement and penalties.

Second, although the concern frequently expressed about the problem of switching sides seems excessive, the present permanent bar on representation of a private party in any "particular matter involving a specific party or parties" in which the employee participated "personally and substantially" on behalf of the government[260] should be retained in the new statute. However, no restriction should be placed on representation with respect to other matters, such as those that were pending under the employee's official responsibility but in which he had no personal and substantial participation.[261]

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[258] 18 U.S.C.A. § 207 (West Supp. 1979), *as amended by* Pub. L. No. 96-28, 93 Stat. 76 (1979).

[259] *Id.*

[260] *Id.* § 207(a).

[261] This concern seems exaggerated because one can be involved "personally and substan-

The present one-year cooling off period on personal advocacy by former high-level personnel before their former agencies, set forth in section 207(c), is a reasonable compromise and should be retained. The one-year ban should only reach personal attempts to influence the agency, and not acts of aiding or advising private colleagues or clients or obtaining information from the agency.

Congress should authorize agencies to impose, with the concurrence of the Office of Government Ethics, additional restrictions based on their particular needs. The proposed legislation, however, should preempt the rules of professional organizations and courts dealing with the subject of postemployment restrictions.

Finally, regardless of the action Congress takes on the above proposals, a former employee's disqualification ordinarily should not extend to his law firm or organization. Instead, Congress should bar the former employee both from personal participation in the matter and from receiving compensation for anyone else's participation. A partner in the firm should submit an affidavit stating that the former employee has been so screened, not as a basis for government approval, but to assure that the firm has in fact recognized the issue and taken steps to deal with it. Courts should retain authority to decide that the circumstances in a particular case require a broader disqualification. In considering whether to do so, courts should give special weight to the agency's view as to whether the screening arrangement affords adequate protection to its interests.[262]

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tially" by signing a complaint in a case, *see* Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314 (D. Hawaii 1975), but unless it appears that the signer could have prevented the complaint or knows some secrets about the strength of the government's case, disqualification does not seem to serve any real governmental interest.

[262] The proposals in this Article were adopted by the Administrative Conference of the United States as Recommendation 79-7 (Dec. 14, 1979), except that the Administrative Conference called for retaining the possibility of criminal sanctions for "clearcut and egregious violations" of section 207.

☆ U. S. GOVERNMENT PRINTING OFFICE : 1981 346-673/7182